Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

PETITION

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1719

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 77-2311 AND 77-2312.

PETITION FOR A WRIT OF CERTIORARI

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CLETUS P. LYMAN

May 23, 1979

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OFFICE OF THE CLERK
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Michael Rodak, Jr., Esquire,
Clerk, Supreme Court of
the United States
One First Street NE
Washington, DC 20543

Re: Skehan v. Board of Trustees, etc., et al.
Petition No. 78-1719

Dear Mr. Rodak:

The above petition was filed May 15, 1979. There is an error on line 4, paragraph 4, page 8, to wit:

"without pay" should be "with pay".

Can the syllable "out" be manually struck out?

Very truly yours,

Cletus P. Lyman

CC: Allen C. Warshaw, Esquire,
Deputy Attorney General

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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Dr. Joseph T. Skehan ("Dr. Skehan"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, rendered in these proceedings on December 21, 1978 (52a).

Opinions and Judgments Below

The United States District Court for the Middle District of Pennsylvania entered judgment, awarding plaintiff $1.00, together with costs, on May 11, 1973, with opinion. The judgment and opinion are printed in the Appendix at 207a-218a and the opinion is reported at 358 F.Supp. 430 (M.D.Pa. 1973). The District Court denied the motions of Dr. Skehan to

amend the judgment and to award attorneys fees on June 12, 1973, with opinion. The opinion and order are printed in the Appendix at 219a-221a and are unreported. The District Court denied Dr. Skehan's motion to reconsider its opinion on June 13, 1973. The order is printed in the Appendix at 222a-223a and is unreported.

The United States Court of Appeals for the Third Circuit entered judgment, vacating the judgment of the District Court and remanding for findings of fact and further proceedings, on May 3, 1974, with opinion. The judgment and opinion are printed in the Appendix at 177a-205a and the opinion is reported at 501 F.2d 31 (3d Cir. 1974). The Court of Appeals denied rehearing on June 11, 1974, without opinion. The order of the Court of Appeals is printed in the Appendix at 206a.

This Court entered an order granting Dr. Skehan's petition for a writ of certiorari on May 27, 1975, and by the same order vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) and *Wood v. Strickland,* 420 U.S. 308 (1975). The order of this Court is printed in the Appendix at 176a and is reported at 421 U.S. 983 (1975).

The Court of Appeals entered judgment, vacating the judgment of the District Court and remanding the case to the District Court for findings of fact and further proceedings, on May 13, 1976, with opinion. The opinion of the Court of Appeals is printed in the Appendix at pages 154a-175a and is reported at 538 F.2d 53 (3d Cir. 1976). This Court denied the petition of present respondents, the Board of Trustees of Bloomsburg State College, Dr. Robert Nossen, Dr. Charles Carlson, John Pittenger, former Superintendent of Education of the Commonwealth of Pennsylvania, and Bloomsburg State College, on November 29, 1976, without opinion. The order of this Court is printed in the Appendix at 153a.

The District Court denied Dr. Skehan's motion for leave to file an amendment to the complaint on December 23, 1974, with opinion. The opinion and order are printed in the Appendix at 151a-153a and are unreported. The District Court denied Dr. Skehan's motion to take additional testimony and granted respondents' motion to take additional testimony on January 10, 1977, with opinion. The opinion and order are printed in the Appendix at pages 146a-150a and are unreported.

The District Court entered judgment on March 24, 1977, on Dr. Skehan's First Amendment claim with order and opinion. The order and opinion are printed in the Appendix at 129a-145a and are unreported.

The District Court entered an interlocutory judgment on May 18, 1977, without any operative provision. The judgment was an aborted effort to implement the opinion of the District Court entered the same day, holding that Dr. Skehan prevailed on several parts of his claims and that respondent Nossen prevailed on certain defenses. The judgment and opinion are printed in the Appendix at 101a-129a and the opinion is reported at 431 F.Supp. 1379 (M.D.Pa. 1977).

The District Court entered judgment on July 20, 1977, with opinion, providing that Dr. Skehan's claim for attorneys fees and expenses was denied; that Dr. Skehan should be restored to "the suspended status" which he had on October 15, 1970; and that a series of hearings and other procedures should commence to determine whether his contract of employment as a faculty member of Bloomsburg State College should be renewed and, if renewed, whether he should be terminated for cause or whether proceedings against him should be dropped. The judgment and opinion are printed in the Appendix at pages 78a-101a and the opinion is reported at 436 F.Supp. 56 (M.D.Pa. 1977).

The District Court denied Dr. Skehan's motion for a new trial without prejudice on August 2, 1977, without opinion. The order is printed in the Appendix at pages 63a-64a. The District Court denied Dr. Skehan's petition to plead and conduct his own case during the post-trial proceedings on August 10, 1977, without opinion. The order is printed in the Appendix at pages 65a-66a. The District Court denied the motion of counsel who represented Dr. Skehan to withdraw, without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 67a-68a. The District Court denied Dr. Skehan's motion to reinstate his motion for a new trial and to plead and conduct his own case without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 69a-70a.

The District Court granted the motion of counsel for Dr. Skehan to withdraw on August 31, 1977, without opinion. The order is printed in the Appendix at 71a-72a. The District Court granted Dr. Skehan's motion to plead and conduct his own case on September 12, 1977, without opinion. The order is printed in the Appendix at 73a-74a. The District Court denied Dr. Skehan's motion for a new trial on September 22, 1977, with opinion. The opinion and order are printed in the Appendix at 75a-77a and are unreported.

The Court of Appeals denied Dr. Skehan's motion to stay part of the District Court's order of July 20, 1977, pending final determination of all motions and appeals challenging it, on November 4, 1977, without opinion. The order is printed in the Appendix at 55a-56a. The Court of Appeals denied Dr. Skehan's motion to reconsider its order denying his motion for a stay, on November 30, 1977, without opinion. The order is printed in the Appendix at 53a-54a.

The Court of Appeals entered judgment on December 21, 1978, affirming the judgment of the District Court of July 20, 1977, excepting that the case was remanded to the District Court for consideration of an award of attorneys fees to Dr. Skehan against the defendants in their official capacities, on December 21, 1970, with opinion. The opinion and judgment are printed in the Appendix at pages 1a through 52a, and the opinion is reported at 590 F.2d 470 (3d Cir. 1978).

The Court of Appeals denied Dr. Skehan's petition for rehearing on February 14, 1979, without opinion. The order is printed in the Appendix at 55a-56a and is unreported.

On February 23, 1979, the Court of Appeals stayed issuance of its mandate until March 23, 1979. The Court's order is printed in the Appendix at 53a. On April 6, 1979, the Court of Appeals further stayed the issuance of its mandate until May 15, 1979. The order is printed in the Appendix at 54a.

Jurisdiction

The Court of Appeals entered judgment, affirming the judgment of the District Court, in part, and remanding for further proceedings, in part, on December 21, 1978. The Court of Appeals enlarged the time in which to file a petition for rehearing, and petitioner filed a timely petition on January 29, 1979, which was denied by order of February 14, 1979 (Appendix, pages 52a-53a).

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1), granting jurisdiction to this Court to review cases in the Courts of appeals by writ of certiorari before or after rendition of judgment.

Constitutional and Statutory Provisions Involved

This case involves Section 9, Article I, and Amendment XIV of the Constitution of the United States; Section 17, Article I, of the Constitution of the Commonwealth of Pennsylvania; Title 42 U.S.C. § § 1983 and 1988; the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. § 1911, *et seq.;* Section 2310 of Pennsylvania Act No. 78-152 (House Bill No. 2437), 42 Pa. C.S.A. § 2310. The texts of these constitutional and statutory provisions are reproduced at the end of this petition.

Statement of Questions Presented for Review

1. In damages suits against state bodies under Title 42 U.S.C. § 1983, should federal Courts decide independently whether such bodies are "persons" able to be sued or should they accept holdings of state Courts that such bodies are agencies of the state for which it claims sovereign immunity?

2. Are state colleges or their boards of trustees "persons" under Title 42 U.S.C. § 1983?

3. Was it settled constitutional law before this Court's decision in *Board of Regents v. Roth,* 408 U.S. 564 (1972), that a public college professor's liberty and property interests in a written contract providing for specific hearings before nonrenewal, suspension and dismissal, were protected by the due process clause?

4. Is a college official who denies due process hearings before termination of employment, required by contract and the due process clause, immune from suit under *Wood v. Strickland,* 420 U.S. 308 (1975), simply because the contract is not adjudicated by a Court before the denial of the hearings?

5. Does Pennsylvania Act No. 1978-152 (House Bill No. 2437) claim sovereign immunity from a claim for damages under Title 42 U.S.C. § 1988 in light of the historic state remedy of mandamus and the incorporation of state remedies into § 1988?

6. May a state annul a vested right of action by one of its citizens against it by enacting sovereign immunity with retroactive effect? May it do so with the assistance of the state's attorney, who is opposing the citizen in court, but without notice to the citizen or opportunity for him to be heard?

7. Where a college faculty member alleges that he was not renewed and was suspended and dismissed on account of protected speech and in violation of his right to hearings by faculty committees on the reasons for these actions, should a federal Court stay its hand until these academic procedures are completed?

8. Can a subsidiary governmental unit waive a defense of sovereign immunity by not raising it in the trial Court?

9. Where a defendant is permitted to raise sovereign immunity for the first time on plaintiff's appeal, should a plaintiff be given the right to amend his complaint and introduce new evidence on remand?

Statement of the Case

1. Nature of the Case

This is an action by a college professor who was non-renewed without hearings required by contract, who was later suspended without hearings required by contract and who was dismissed without a hearing required by contract in the middle of his contract term and who seeks reinstatement, back pay, and expenses of litigation, including attorneys fees.

He alleged that he was non-renewed, suspended and dismissed in retaliation for exercise of rights protected by the First Amendment and that the failure to afford him hearings before non-renewal, suspension and dismissal deprived him of procedural due process violative of the Fourteenth Amendment.

Jurisdiction of the District Court was invoked under Title 28 U.S.C. § 1343, granting jurisdiction over civil rights actions.

2. Statement of Facts

Dr. Skehan has been unemployed since October 17, 1970, when he was dismissed by the president of Bloomsburg State College from his post of associate professor of economics, excepting that he was employed in suspended status, without pay, pursuant to the judgment of the District Court, from July 20, 1977, through June 2, 1978.

The background of his employment and dismissal follows. In January, 1969, Bloomsburg State College appointed Dr. Skehan associate professor in the economics department. Dr. Skehan quickly became outspoken on issues of interest on campus, including matters of U.S. foreign policy and questions of college governance such as faculty and student powers and rights.

Plaintiff had a written contract of employment which automatically renewed itself unless the college president gave notice of non-renewal by specified dates. The contract ripened into permanent tenure after completion of the third year.

The written contract consisted of an individual writing naming Dr. Skehan, signed by him and the president of Bloomsburg State College, and incorporated by reference the existing college employment code.

Bloomsburg State College is one of 14 state colleges in Pennsylvania. It is subject to the Public School Code of 1949, as amended, Title 24 P.S. § § 20-2001, *et seq.* Bloomsburg State College is governed by a board of trustees consisting of nine members, having terms of six years. Trustees are selected from the five-county area around Bloomsburg, Pennsylvania, and include one member of the student body, two officials of neighboring primary-secondary school districts and two county or district political party officials. The board of trustees' powers include: (i) to review all matters pertaining to the welfare and well-being of the college and its students; (ii) to approve the annual operating and capital budget requirements for the institution prepared by the president; (iii) to review and approve all direct purchases made by the president without competitive bidding; and (iv) to approve the appointment of all employees, in accordance with law.

Bloomsburg State College receives some of its operating funds from state tax revenues but it also receives some of its operating funds from tuition and fees paid by students and their parents, from grants by private foundations and state and federal public agencies, from gifts by alumni and friends, and from rentals of property.

Bloomsburg State College has its own seal. The board of trustees has incorporated a subsidiary known as the Bloomsburg Foundation for the purpose of performing miscellaneous services at the college.

Dr. Skehan's contract was on its face between him and Bloomsburg State College, not the Commonwealth of Pennsylvania. The college employment code described faculty members as being "employed by the college."

The employment code provided for hearings before any faculty member could be suspended or dismissed. A faculty member could be suspended only if he were found to be a danger to himself or to others or if he were found guilty of treasonable or grossly immoral conduct. The employment code also provided that if an untenured faculty member's contract was not renewed, he could allege that the reason for the decision was violative of his academic freedom. Bloomsburg State College was then required to give him a hearing before a specified faculty committee on the reasons for non-renewal.

Dr. Skehan's employment contract was expressly renewed during the spring of 1969 for the 1969-70 academic year. On December 15, 1969, Dr. Skehan's contract automatically renewed itself for the 1970-71 academic year. No notice of non-renewal was sent by that date.

On December 18, 1969, Dr. Skehan was summoned to the office of the college president, where the president denounced him for his activism in faculty matters. He called Dr. Skehan's petition to the college regarding the rights of another professor as "childish" and "infantile".

In May, 1970, the president informed Dr. Skehan that his contract, although renewed for the 1970-1971 school year, would not be renewed for the 1971-72 year. Dr. Skehan responded by alleging that the decision not to renew his contract was made because of his outspokenness on campus issues.

During the fall of 1970, a dispute arose about scheduling in the economics department. By letter of October 9, 1970, the president purported to suspend Dr. Skehan for his conduct arising out of the scheduling dispute. Dr. Skehan replied by letter of October 12, 1970, that the suspension was not preceded by procedures called for in the college employment code and he demanded such procedures. On October 19, 1970, the president purported to dismiss Dr. Skehan "subject to final approval by the board of trustees." Dr. Skehan wrote each trustee a certified letter requesting hearings in accordance with the college employment code. However, on October 26, 1970, Dr. Skehan received a letter from the president saying that the board met on October 23, 1970, and confirmed the president's decision to dismiss Dr. Skehan and that, accordingly, he was "fully and finally terminated at the college effective October 16."

3. Course of the Proceedings

Dr. Skehan pursued remedies through professional channels and then, on October 10, 1972, began this action. On May 9, 1973, he prevailed in the District Court on his claim that his right to hearings before adverse actions by the college, protected by the due process clause, was violated (214a). After more than seven years of litigation, including a ruling in his favor in this Court in 1975 (176a), he has yet to receive any relief excepting: (i) he was restored to the college payroll by order of the Court (99a-101a) from July 20, 1977, through June 2, 1978; and (ii) the District Court ordered (99a-100a) a hearing by a specified faculty committee, which resulted in a

unanimous decision that the non-renewal of his employment contract in May, 1970, was for reasons which were violative of his academic freedom. The committee reported as follows.

"BLOOMSBURG STATE COLLEGE
Bloomsburg, Pennsylvania 17815

"FINAL REPORT OF THE COMMITTEE ON PROFESSIONAL AFFAIRS

"As a result of informal hearings held pursuant to Judge Muir's July 20, 1977 Order, the Committee on Professional Affairs, in accordance with Section 9a of the Statement of Policy of Bloomsburg State College in force in 1970, makes the following recommendation to the President of Bloomsburg State College:

"After reviewing the evidence submitted to this committee (Committee on Professional Affairs), we are of the opinion that the decision not to renew Dr. Skehan's contract was for reasons which were violative of his academic freedom.

"Further the committee has seen no convincing evidence that Dr. Skehan would not have been rehired had he remained silent about campus issues.

"Furthermore, the committee has seen written evidence attesting to Dr. Skehan's ability as an economist and educator written by his department chairman and others.

"The committee also has testimony from a former member of the Board of Trustees that the Board was not aware of all the facts in the case of Dr. Skehan before action was taken.

"Therefore, the committee recommends that the non-renewal of Dr. Skehan's contract be reconsidered; meanwhile he should be removed from suspended status, be placed at full academic status and be given a teaching assignment in the Department of Economics.

"In conclusion the committee sees no need for institution of formal proceedings to reconsider the non-renewal of Dr. Skehan.

"This recommendation, in the form of a motion, was passed unanimously by the Committee on Professional Affairs on December 2, 1977.

"/s/ Charles M. Brennan 12/5/77 Charles M. Brennan	/s/ Julius R. Kroschewsky 12-5-77 Julius R. Kroschewsky
"/s/ Stephen M. Bresett 12/6/77 Stephen M. Bresett	/s/ James C. Pomfret 12-6-77 James C. Pomfret
"/s/ James E. Cole 12/5/77 James E. Cole	/s/ June L. Trudnak 12-5-77 June L. Trudnak
"/s/ P. Joseph Garcia 12/5/77 P. Joseph Garcia	/s/ Norman E. White 12-5-77 Norman E. White
"/s/ JoAnne S. Growney 12/5/77 JoAnna S. Growney "	

The Court of Appeals has required (47a-52a) further proceedings in the District Court, which should lead to the award of attorneys fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. The Court of Appeals has also authorized (44a-46a) proceedings in the lower Court to decide in the first instance whether, under the terms of the District Court's judgment of July 20, 1977, and in light of proceedings at the college level since that judgment, Dr. Skehan should now be reinstated to full faculty status.

Dr. Skehan has been denied back pay by reason of the following rulings in the lower Courts. The Court of Appeals permitted (192a-196a) the college to raise the defense of state sovereign immunity for the first time on Dr. Skehan's appeal in 1973, after trial in the District Court. The Court of Appeals then looked to (28a, 173a) *Brungard v. Hartman*, 12 Pa.Commw. 477, 315 A.2d 913 (1974), the decision of a hybrid trial and intermediate appellate Court, that state colleges are agencies of the Commonwealth for which it

claims sovereign immunity. The Court of Appeals held that *Brungard* was dispositive of the issue of sovereign immunity in this action under § 1983 *

Although the Court of Appeals considered (33a-39a) this Court's decision in *Monell v. Department of Social Services of City of New York*, ... U.S. ....., 98 S.Ct. 2018 (1978) on Dr. Skehan's more recent appeal, it made no independent inquiry to determine whether a state college was a "person" under § 1983.

The Court of Appeals also held that Pennsylvania had in force a doctrine of sovereign immunity which barred an action under § 1983 (30a-33a). In so doing, the Court of Appeals interpreted (32a-33a) a sovereign immunity act of the Pennsylvania Legislature, passed September 28, 1978, as barring a § 1983 claim, even though the act expressly preserved causes of action otherwise specifically authorized by statute and even though Pennsylvania had a long-standing mandamus act authorizing actions of this kind. The Court of Appeals ignored the mandamus act and the provisions of Title 42 § 1988 which expressly incorporate remedies provided by the common law and state statute and the remedies available for violations of § 1983.

The Court of Appeals accorded validity to the Pennsylvania act, as interpreted by it, even though the act annulled a vested right of action by Dr. Skehan retroactively and even though the act was hurried through the legislature with participation of the state's attorney, who was representing all the defendants in this action, but without notice to Dr. Skehan or opportunity for him to be heard. In fact, no legislative hearings were held.

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* *Brungard v. Hartman, supra,* was a ruling on a motion to dismiss a complaint alleging that Mansfield State College was owned and operated by the state. Taking the complaint as true, the Court dismissed it.

The District Court, on remand, denied Dr. Skehan's motions to amend his complaint (151a-153a) and to introduce additional evidence (145a-150a) even though his lawsuit had been greatly changed by the raising of sovereign immunity for the first time in the Court of Appeals.

The District Court held (123a-126a) that the college president enjoyed official immunity for his violation of Dr. Skehan's constitutionally protected rights to hearings because the president did not and should not have known that he was acting in violation of clearly settled law in 1970, though that Court had found in 1973 that *Wieman v. Undegraff,* 344 U.S. 183 (1952), was "precisely the situation in the case at bar (214a)." The District Court held (124a-125a) that Dr. Skehan's rights were not established as a matter of constitutional law until this Court's decision in *Board of Regents v. Roth,* 408 U.S. 564 (1972). The Court of Appeals affirmed (43a-44a) and also held (44a) that the college president did not and should not have known that he was violating a contract because the contract had not been adjudicated by a Court until after this action was brought.

The District Court found (132a-135a, 137a-143a, 208a-212a), pursuant to Rule 52(a), F.R.C.P., that the actions taken by the college against Dr. Skehan were not primarily motivated by Dr. Skehan's outspokenness on campus issues and that they would have been taken for other reasons, including Dr. Skehan's conduct during the scheduling dispute. The Court of Appeals, while acknowledging (18a, 188a-190a) that there was much evidence to the contrary, sustained (17a-20a, 188a-190a) the District Court's findings as not clearly erroneous. The District Court made its findings in May, 1973, and March, 1977, before it ordered proceedings on the same general subject at the college level. As noted above, hearings in the fall of 1977, before a specified faculty committee, reached an opposite conclusion.

REASONS WHY WRIT SHOULD BE ALLOWED

1. The Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court.

The failure of the Court of Appeals either to inquire whether Bloomsburg State College or its board of trustees were "persons" within the meaning of § 1983 or to direct the District Court to do so conflicts with *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Its reliance on a Pennsylvania Court's holding that state colleges share in sovereign immunity and its failure to inquire into federal law on the subject conflicts with *Monell* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. ...., 99 S.Ct. 1171 (1979).

In *Monell*, this Court decided that the Department of Social Services and the Board of Education of the City of New York were persons within the meaning of 42 U.S.C. § 1983. The Court reached its conclusion based on an analysis of § 1983, including its legislative history. The Court did not rely on the law of the State of New York as to whether the department or board shared in New York's sovereign immunity.

In *Lake Country*, this Court concluded that a bi-state authority lacked immunity under the Eleventh Amendment, in part, because the actual operation of the authority brought it outside the scope of the Eleventh Amendment, as a matter of federal constitutional law. This Court relied only in part on the intentions of California and Nevada in creating the authority, and this Court's decision suggests that a federal Court's interpretation of the scope of the Eleventh Amendment controls regardless of the law of the states regarding sovereign immunity of the authority.

The decision of the Court of Appeals (44a): that *Board of Regents v. Roth*, 408 U.S. 564 (1972), was "the first definitive holding" that termination of teachers' property interests in

their employment contracts with state institutions require due process hearings, is in conflict with the *Roth* decision itself and this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), and the earlier decisions of this Court making up the history of constitutional law outlined in *Roth* and *Paul*.

In *Roth*, this Court held that a faculty member who was deprived of a hearing on the reasons for his non-renewal did not have a cause of action under the due process clause because his contract did not require such hearings and because non-renewal, without reasons, did not stigmatize him. In reaching its decision, this Court reviewed the history of the protection of both "liberty" and "property" interests under the due process clause. The Court said that, under its prior decisions, it was well established that, where action prejudicial to faculty members implied that they were guilty of dishonesty or immorality, such faculty members were entitled to a hearing. The Court observed that a long line of cases held that where a person was stigmatized or seriously damaged in his standing and his associations in his community, he is entitled to notice and a hearing beforehand. Dr. Skehan's suspension and dismissal in mid contract stigmatized and damaged him in these ways because of the opprobrium associated with such drastic measures within his profession. Suspension means the faculty member is a danger to himself or others or has been found guilty of treasonable or grossly immoral conduct.

This Court, in *Roth*, also held that it was well established that college professors and staff members dismissed during the terms of their contracts were entitled to hearings in advance under the due process clause. This Court cited *Wieman v. Undegraff*, 344 U.S. 183 (1952), as having established the principle.

It is puzzling that the Court of Appeals characterized *Roth* as (44a) "the *first definitive holding* that a termination of teachers' property interests in their employment contracts

with state institutions required due process hearings (emphasis supplied)." This Court's statement to that effect in *Roth* was clearly a review of earlier holdings. *Roth* held that a teacher without a contract right to a hearing on the reasons for his non-renewal lacked a separate right to such a hearing under the Fourteenth Amendment.

In *Paul, supra,* this Court again summarized the history of the right of citizens to hearings before prejudicial action taken by the state. This Court observed that the right to a hearing in advance before being stigmatized was settled constitutional law at least as early as *United States v. Lovett,* 328 U.S. 303 (1946). This Court also cited in support of the principle, *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951) and *Wieman v. Undegraff, supra.*

The decision of the Court of Appeals (44a): that the college president acted "in good faith" because Dr. Skehan's contract was not adjudicated by a Court before he was denied hearings, is in conflict with this Court's decision in *Wood v. Strickland, supra.* In *Wood,* this Court held that a school official does not have immunity from suit when he acts in disregard of settled, indisputable law and violates constitutionally protected rights. While this Court was addressing itself to settled constitutional law, the rationale of *Wood* was that an official acting in good faith should not be subject to personal liability for damages. Where, as here, the college president acted in breach of a specific contract, which he renewed twice by his own signature, the inference of good faith is ruled out.

The Court of Appeals has equated "settled, indisputable law" with a declaratory judgment construing the obligations of the parties in the controversy. Since declaratory judgments will rarely be entered before constitutional violations occur, the Court of Appeals has converted the qualified immunity test of *Wood* to absolute immunity.

2. The Court of Appeals rendered a decision on an important question of federal law, which has not been squarely decided by this Court and which points out disharmony of decisions of this Court. Its decision is in conflict with the apparently controlling decision of this Court.

The Court of Appeals decided (173a) in 1976 that Bloomsburg State College and its board of trustees in their official capacities were absolutely immune from suit under § 1983. It reaffirmed (39a) this decision in 1978 after this Court decided *Monell, supra.* The Court of Appeals based its decision on *Edelman v. Jordan,* 415 U.S. 651 (1974), holding that the award of retroactive welfare benefits by reason of wrongful denial of benefits by state officials violated the Eleventh Amendment. *Edelman* was reaffirmed by this Court, after the Court of Appeals decision, in *Quern v. Jordan,* .... U.S. ...., 99 S.Ct. 1139 (1979). *Quern* also involved retroactive welfare benefits. The conclusive fact in the *Edelman* and *Quern* cases was that decisions of the lower Courts imposed liabilities which must be paid from public funds in the state treasury. *Edelman* and *Quern* did not deal with the question whether a state welfare department is a "person" under § 1983.

Monell, supra, on the other hand, was decided on the ground that the Department of Social Services and the Board of Education of the City of New York were "persons" within the meaning of § 1983 and without considering whether an award would be paid directly out of the New York State treasury. In this case, an award of back pay arguably must be paid from the state treasury (as the Court of Appeals assumed). In a sense, this is not so since at least some of the funds of Bloomsburg State College come from fees and tuition, grants and sources other than state taxes.

At the same time, Bloomsburg State College and its trustees in their official capacities are "persons" under § 1983, as interpreted by *Monell.* Or, at the very least, there is no discernible basis in *Monell* to distinguish a board of trustees of a state college from the Board of Education of the City of New York. That a state college is engaged in higher education as opposed to primary and secondary education is immaterial to its personhood.

Respondents may argue that the New York Board of Education is more independent fiscally from the State of New York than Bloomsburg State College is from the Commonwealth of Pennsylvania and that an award against the New York Board of Education is not an award against the New York State treasury. Such an argument would be antithetical to *Monell,* although it would find some support in *Edelman* and *Quern.* Since the decision in *Monell* did not deal with the *Edelman-Quern* state treasury issue, there is no factual basis in *Monell* to provide a basis of comparison.

The Court should follow *Monell* and make all boards of education subject to suit as "persons" regardless of the amount or directness of their funding by the state. Otherwise, the availability of redress under § 1983 would depend on the formal details of budgetary arrangements and would lead to technical and arbitrary distinctions. For example, primary and secondary education is funded directly by the state treasury in Hawaii. The Hawaii Board of Education would be immune, whereas the New York City Board of Education would not. Pennsylvania spends money on schools with a variety of formal ties to the Commonwealth, including private universities. The Commonwealth spends far more on the University of Pennsylvania, a "private," "Ivy League" university, than on Bloomsburg State College. Amenability of Bloomsburg State College to suit would have less impact on the state treasury than amenability of other institutions which are almost certainly suable under *Monell.*

Bloomsburg State College is readily recognizable as a person, even more so than the New York Board of Education. It has a campus, a faculty, a student body, an alumni body, trustees, officers, a seal, school spirit, colors, insignia, school songs, athletic teams and is known by its alumni as "alma mater" or "nourishing mother."* By comparison, the New York Board of Education is impersonal. Bloomsburg State College serves a five county area as does the New York Board of Education.

3. This petition raises additional questions of federal law which should be settled by this Court.

Complaints of illegal termination of public employees, both because of impermissible reasons such as retaliation for protected speech and because of lack of required prior hearings, are frequent. This Court has been called upon to establish guidelines for such actions. *Compare, Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977). These cases frequently involve faculty members in higher education. *Compare, Roth, supra.* This is a case where the federal Courts both decided whether the faculty member was not renewed for impermissible reasons (the Courts answered: "no") and provided by final judgment for hearings on the same general question by a faculty committee, under the faculty member's employment contract (the committee answered: "yes").

---

* Colleges and universities have been personified in songs as of the feminine gender, as in these words, from the Yale Alma Mater: "A song for old Yale, For brave old Yale, Who hath stood in her glory long," "Songs of All the Colleges," Hinds, Noble & Eldredge (N.Y.C., 1906 ed.); and in this example: "Sons of Georgetown, Alma Mater, Surft Potomac's lovely daughter, Ever watching by the water, Smile on us today," "Everybody's Favorite Songs of the American Colleges," Comp. and Ed. by Bernard A. Young, Inter-collegiate Music (Boston, 1938).

In a dissenting opinion in *Roth, supra,* Mr. Justice Douglas observed that the Court of Appeals in that case concluded that, though a § 1983 action was pending in the district Court, the district Court should stay its hand until the academic procedures were completed. Mr. Justice Douglas approved that result. He quoted with approval the following language from *Sindermann v. Perry,* 430 F.2d 939 (5th Cir. 1970).

> "School constituted review bodies are the most appropriate forms for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination."

This Court should now squarely decide whether this is the correct approach and it should decide in the affirmative. Adjudication by a Court before adjudication by the faculty committee required by contract, deprives the college professor of the benefit of the contractual right to the committee determination. This right was carefully developed by the academic profession. Court hearings require lawyers, and other expenses. Court procedures are different and Courts are unfamiliar with academic concepts. The Court's non-expert determination will tend to sway the more expert faculty committee rather than vice versa.

The Court of Appeals accorded validity to an immunity statute enacted one day before oral argument in the Court of Appeals in 1978. It did so, although this act was passed by the legislature with the assistance of the state's attorney, who was opposing Dr. Skehan in this case, without notice to Dr. Skehan of the pendency of the bill or opportunity for him to be heard. The Court of Appeals interpreted the statute as barring Dr. Skehan's cause of action against the state college

and its board of trustees in their official capacities even though this action was begun in 1972 based on occurrences in 1970. The Court should, if the need arises in this case, decide whether such *ad hominem* legislation, enacted in such a fundamentally unfair way, is valid.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Constitutional and Statutory Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

. . . No Bill of Attainder or *ex post facto* law shall be passed . . .

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

Article I
Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT—

* * *

Section 17. No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

TITLE 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42 U.S.C. § 1988

(Reproduced in the Appendix, printed separately, at 92a).

Excerpts from the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. §§1911 *et seq.*

§ 1911. To whom writ may be issued

The several courts of common pleas shall, within their respective counties, have the power to issue writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county and to any corporation doing business or having its property, in whole or in part, within the county: Provided, The relief, act, duty, matter, or thing, the performance of which is sought, should be given or performed within such county; and the court of common pleas of the county in which the seat of government is or may be located shall have the power, and it shall be required, to issue the writ of mandamus to all officers of the executive department of the Commonwealth as defined in Article IV, section one, of the Constitution, except the Governor; all other heads of administrative departments of the State government, except the Secretary of Banking; all independent administrative boards or commissions of the State government and all departmental administrative boards or commissions of the State government. 1893, June 8, P.L. 345, § 1; 1899, April 28, P.L. 84, § 1; 1903, March 19, P.L. 32, § 1; 1913, June 19, P.L. 526, § 1; 1925, May 13, P.L. 664, § 1.

* * *

§ 1913. Who may apply

The writ of mandamus may issue upon the application of any person beneficially interested. 1893, June 8, P.L. 345, § 3.

* * *

§ 1915. Proceedings against board, other than a corporation

When the writ is sought against a board or body other than a corporation, it shall be directed to such board or body in their official capacity, and service shall be made upon a majority of the members thereof, unless the board or body was created by law and has a chairman or other presiding officer appointed pursuant to law, in which case service upon him shall be sufficient. 1893, June 8, P.L. 345, § 8.

* * *

§ 1919. Recovery of damages and costs

If a verdict is found for the plaintiff and judgment is entered thereon, or if a judgment is given for him upon a demurrer, or by *nihil dicit,* or for want of an answer, by *non sum informatus,* or other pleading, he shall recover his damages and costs. 1893, June 8, P.L. 345, § 16.

Section 2310 of Pennsylvania Act No. 78-152, 42 Pa. C.S.A. § 2310

§ 2310. Sovereign immunity reaffirmed; specific waiver

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.

FILED
SEP 25 1979
MICHAEL RODAK, JR., CLERK

MOTION

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1719

DR. JOSEPH T. SKEHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 77-2311 AND 77-2313.

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Respondents.

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

Dr. Joseph T. Skehan, petitioner, hereby moves the Court for leave to amend his petition for a writ of certiorari (filed May 15, 1979) to add a question, set forth below. Petitioner asks that, if this motion is granted, the petition be deemed amended without need to file a new version of the petition.

The additional question is as follows:

10. In light of this Court's decision in *Davis v. Passman*, ... U.S. ...., 99 S.Ct. 2264 (decided June 5, 1979), may a citizen recover damages against his own state when his claim for relief arises under the Fourteenth Amendment?

In *Davis*, the Court recognized an implied cause of action for damages under the due process clause of the Fifth Amendment against a member of Congress. The Court relied on such factors as: the absence of an explicit Congressional declaration that claimants may not recover money damages from Congressmen; and, the desirability of providing a judicial remedy to enforce Constitutional rights.

It would be inconsistent to allow a cause of action against a Congressman for damages but to bar such a cause of action against a state since the Fourteenth Amendment provides a stronger basis for allowing the cause of action.

Section 1 of the Fourteenth Amendment begins by defining citizens of states as persons who reside therein. The same section provides that no state shall deprive any person of life, liberty or property without due process of law. It is the relationship between the states and persons, and especially "citizens" of the states, that the Fourteenth Amendment was intended to regulate. Petitioner is within the class sought to be protected by the Fourteenth Amendment and the Commonwealth of Pennsylvania is within the class whose conduct was sought to be regulated. Petitioner pleaded violation of equal protection of the law in connection with all causes of action. As the Court observed in *Davis*, damages are the "ordinary" remedy for invasion of Constitutionally protected interests. 99 S. Ct., at 2276-2277.

The Courts below held that the damages remedy was barred by the Eleventh Amendment. However, the Eleventh Amendment does not explicitly regulate actions between citizens and their own states. It deals only with actions between citizens of other states and foreign states. The bar was implied by this Court in *Hans v. Louisiana*, 134 U.S. 1 (1889). This Court has already recognized that the bar of *Hans* has been superseded

in some instances by the Fourteenth Amendment. *Hutto v. Finney*, ... U.S. ...., 98 S.Ct. 2565 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Consistent with *Davis*, the Court should broaden the availability of damages remedies against the states under the Fourteenth Amendment to include petitioner's claim for back pay. *See, Butz v. Economou*, 438 U.S. 478 (1978); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 15 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1719

DR. JOSEPH T. SKEHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 77-2311 AND 77-2312.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2311 and 77-2312

DR. JOSEPH T. SKEHAN

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE and DR. ROBERT NOSSEN and DR. CHARLES CARLSON and JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania and BLOOMSBURG STATE COLLEGE.

DR. JOSEPH T. SKEHAN,
Appellant in No. 77-2311,

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE and DR. ROBERT NOSSEN and DR. CHARLES CARLSON and JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania and BLOOMSBURG STATE COLLEGE,
Appellants in No. 77-2312.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Civ. No. 72-644, M.D. Pa.)

Argued September 29, 1978

Before SEITZ, *Chief Judge,* HUNTER, *Circuit Judge,* and LACEY*, *District Judge.*

(Opinion filed December 21, 1978)

---

* The Honorable Frederick B. Lacey, United States District Court Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

Plaintiff, Dr. Joseph T. Skehan (appellant in No. 77-2311), appeals from the following aspects of a final judgment entered by the district court, embodied in three separate orders and opinions: 1) a denial of Skehan's motion for judgment in his behalf on a claim that his contract as a faculty member of Bloomsburg State College was not renewed beyond the 1970-71 academic year for reasons violative of the first amendment; 2) a denial of Skehan's request for an award of monetary damages from either the College or the individual defendants as a remedy for the defendants' violation of his due process rights with respect to both his nonrenewal and his later dismissal from the College faculty; 3) a denial of Skehan's request that he be awarded equitable relief in the nature of full reinstatement to the College faculty as a remedy for the defendants' violations of his constitutional rights; and 4) a denial of Skehan's claim for attorney's fees and expenses.

Defendants, Bloomsburg State College, its Board of Trustees, Dr. Robert Nossen (President of the College during the period in which the events culminating in this lawsuit transpired), Dr. Charles Carlson (acting President of the College at the time Skehan filed his complaint) and John Pittenger (Pennsylvania Superintendent of Education) (appellants in No. 77-2312), cross-appeal from that aspect of the district court's judgment finding that Skehan was contractually entitled to an "academic freedom" hearing following his nonrenewal and that their failure to provide him with such a hearing violated his rights under the due process clause of the fourteenth amendment.

Factual Background

The history of this litigation over the course of the past eight years may be garnered from the two previous opinions of this Court and the three opinions of the district court at issue here. The facts essential to an appreciation of the questions presented in this appeal are recounted herein.

Dr. Skehan was appointed as a non-tenured Associate Professor of Economics at Bloomsburg State College in January, 1969. His contract was renewed for the 1969-70 academic year, but on February 27, 1970, the College's Board of Trustees, on the recommendation of defendant Nossen, decided that Skehan should be notified that the 1970-71 academic year would be the terminal year of his appointment. Skehan was notified of the Board's action through a letter from President Nossen, dated May 19, 1970.

On September 21, 1970, Skehan wrote Nossen a letter invoking Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College [hereinafter Article 5e]. In that letter he alleged that the decision not to reappoint him after 1970-71 had been caused by considerations violative of his academic freedom.[1] Nossen did not refer Skehan's letter to the Committee on Professional Affairs, the College body charged with initiating proceedings under Article 5e to resolve such allegations, nor did Skehan take any further action to secure an Article 5e hearing.

Contemporaneous with his invocation of Article 5e, Dr. Skehan became embroiled in a dispute between the economics department and the College's administration concerning the scheduling of classes. During that dispute Skehan was warned that his failure to teach his classes as scheduled by the College would result in the taking of immediate and direct administrative action against him. On or about October 1, 1970, Dr. Skehan was observed teaching a course not assigned to him, and on October 9 Dr. Nossen notified Skehan that he was relieved of all classroom responsibilities pending a final hearing. Nossen's letter of October 9 also demanded of Skehan a "full and complete accountability" of his actions on campus since the start of the semester. When Skehan failed to comply with this

1. The Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College went into effect on September 1, 1968. It has since been superseded by a collective bargaining agreement, but was in effect during the entire period of Skehan's dispute with the College. Article 5e provided:

> If a faculty member's service to the College is to be terminated during the first two years of the probationary [pretenure] period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of infringement of academic freedom. If a faculty member of professorial rank, on probationary appointment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegation shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in #9 of this document will be followed.

Article 9 of the Statement, referred to in Article 5e, set out the formal procedures applicable to the dismissal of a tenured faculty member.

demand, Dr. Nossen informed him that, effective October 17, 1970, he was removed from the College's payroll, subject to final approval by the Board of Trustees. That approval was obtained at the Board's regularly scheduled meeting of October 23, 1970.

Skehan filed a complaint in district court on October 10, 1972. He alleged that his suspension and ultimate dismissal in the Fall of 1970 were in retaliation for his active role in campus political issues, and hence were violative of his rights under the first amendment. He also alleged that the defendants suspended and dismissed him without complying with the applicable College laws and regulations governing faculty status, thereby depriving him of that due process of law guaranteed by the fourteenth amendment. He requested preliminary and permanent injunctive relief in the nature of reinstatement and an award of attorney's fees.

The district court held a hearing on Skehan's request for a preliminary injunction on January 11 and 12, 1973. Preliminary injunctive relief was denied in an opinion and order dated January 31, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 353 F. Supp. 542 (M.D. Pa. 1973). Subsequently, the parties stipulated that a final hearing could be held on the record developed at the preliminary injunction hearing, and the district court issued its opinion on the merits on May 9, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 358 F. Supp. 430 (M.D. Pa. 1973).

In that opinion, the district court held that Skehan's dismissal from the faculty had been a result of his actions during the scheduling dispute. Thus, his dismissal was found not to have been violative of the first amendment. However, the district court did find that Skehan's dismissal during the term of his contract entitled him, under the due process clause, to a prior hearing on the grounds of his dismissal, and that such a hearing had not been afforded Skehan by the College.

On appeal this Court affirmed both findings with respect to Skehan's dismissal, but noted that Skehan had also challenged the constitutionality of the Board of Trustees' decision not to renew his contract beyond 1970-71. Thus, this case was remanded to the district court for findings on the questions whether the nonrenewal decision had been motivated by the College administration's disagreement with Skehan's stands on campus issues and whether Article 5e had contractually entitled Skehan to a hearing on the reasons for his nonrenewal. This Court also directed the district court to consider whether the College shared in the sovereign immunity of the Commonwealth of Pennsylvania so that it would be immune under the eleventh amendment from Skehan's claim for damages. We held that the individual defendants were entitled to absolute immunity from damages as executive officials exercising discretionary governmental functions, and indicated that Skehan might be entitled to an award of attorney's fees from the College as a private attorney general vindicating a public interest. *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974).

Trial on the issues remanded to the district court was postponed while Skehan's petition for writ of certiorari to the Supreme Court was pending. On May 27, 1975, the Supreme Court granted his writ, vacated the judgment of this Court, and remanded the case "for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* [421 U.S. 240 (1975)], and *Wood v. Strickland,* 420 U.S. 308 (1975)." 421 U.S. 983 (1975). This Court reviewed the case en banc on remand from the Supreme Court, and addressed itself to three issues respecting the relief to which Skehan might be entitled for the defendants' actions in bringing about his nonrenewal and termination. *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir. 1976).

First, we noted that *Alyeska* had overruled the cases upon which this Court had earlier relied in determining

that Skehan, as a "private attorney general," was entitled to an award of attorney's fees. Thus, the attorney's fees aspect of the case was remanded to the district court for findings on pre-litigation obduracy, and for consideration of an award of fees based on the defendants' future maintenance of this litigation in bad faith. This Court held that only the latter ground could be the basis of a fee award against the College given that it was a state agency for which the Commonwealth of Pennsylvania claimed sovereign immunity. 538 F.2d at 55-59.

Second, we noted that the Supreme Court had demonstrated in *Wood v. Strickland* that this Court's earlier holding that the individual defendants were absolutely immune from liability as nonjudicial government officials performing adjudicatory functions was inappropriate. Thus, the question of official immunity was remanded to the district court for findings of fact with respect to the immunity of each defendant under the test articulated by the Supreme Court in *Wood. Id.* 59-62.

Finally, this Court stated that an intervening decision of the Pennsylvania Commonwealth Court, *Brungard v. Hartman,* 12 Pa. Commw. Ct. 477, 315 A.2d 913 (1974), holding that state colleges are agencies for which Pennsylvania claims sovereign immunity, was dispositive of the eleventh amendment issue concerning the College's liability for damages. Thus, we held that a back pay award could not be made out of the College's treasury, and that an award of attorney's fees against the College could only be based on the exception to the American rule for the maintenance of litigation in bad faith. 538 F.2d at 62.

In conclusion, this Court reiterated that on remand the district court was to make findings of fact on the nature of the interest created by Article 5e and on whether the decision not to renew Skehan's contract beyond 1970-71 had been impermissibly based on his stands on campus issues. The Supreme Court denied defendants' petition for a writ of certiorari on November 29, 1976. 429 U.S. 979 (1976).

It is with this background in mind that we turn to the parties' challenges to the district court's disposition of the issues remanded to it by this Court.

I. The First Amendment Claim

The district court issued its first opinion after remand on plaintiff's and defendants' cross-motions for judgment on Skehan's claim that the decision not to reappoint him after 1970-71 was for reasons violative of the first amendment. *Skehan v. Board of Trustees of Bloomsburg State College,* No. 72-[illegible] (M.D. Pa., filed March 24, 1977) (unpublished opinion). The district court awarded judgment to the defendants on that claim. Three aspects of that ruling are at issue in this appeal. First, the defendants contend that the district court erred in rejecting their argument that Skehan's first amendment claim was barred by the applicable Pennsylvania statute of limitations. Skehan appeals from the court's disposition of the merits of the first amendment claim, and also contends that the court abused its discretion in denying his motion to take additional testimony on that issue.

Before meeting those contentions we must address the defendants' argument that the district court's disposition of the first amendment claim should be affirmed because it was not raised by Skehan in his complaint or in any court proceedings, but rather was first raised by this Court *sua sponte* in the 1974 panel opinion. We believe that Skehan's initial complaint did challenge the validity of the nonrenewal decision, and that the question whether that decision was violative of the first amendment was litigated by the parties at the preliminary injunction hearing held in January, 1973. In fact, the district court decided not to take additional testimony on the first amendment nonrenewal issue after remand precisely because the parties had had a full opportunity to present all evidence concerning the reasons which may have motivated the Board's decision not to renew Skehan's contract at that earlier

hearing. *See* Part I,B *infra.* Moreover, this Court's en banc opinion remanding the first amendment issue to the district court represents the "law of the case" with respect to that aspect of Skehan's claim. We are bound by the earlier determination of this Court, and thus reject the defendants' argument, raised at this late date, that the issue should not have been remanded to the district court. *See* Part II,A *infra.*

A. *Statute of Limitations*

The district court found that Skehan's nonrenewal claim stated a cause of action under 42 U.S.C. § 1983. Because § 1983 does not contain its own statute of limitations, the court turned to Pennsylvania law to determine the period of limitations applicable to the most analogous state law claim. The court held that the six year statute of limitations established by the Act of March 27, 1713, 1 Sm. L. 76, § 1, 12 P.S. § 31, governed Skehan's claim, as it governed the state law claim the court found to be most analogous to it, namely a claim of wrongful interference with an employment contract. Defendants argue that the court erred in holding the six year period of limitations applicable to Skehan's claim, contending that the two year period of limitations established for personal injury actions in the Act of June 24, 1895, P.L. 236, § 2, 12 P.S. § 34, should be applied to a § 1983 action claiming a violation of the first amendment. They further contend that Skehan's nonrenewal claim arose on the day he was notified of the Board's decision not to reappoint him beyond 1970-71, at the latest May 19, 1970, and that his claim should thus be barred because he did not file his complaint in federal court until October 10, 1972.

Skehan counters that even if the two year period of limitations established in 12 P.S. § 34 applies to his first amendment claim, that claim is not barred because his cause of action did not accrue until he was terminated on October 19, 1970. He reasons that up until that time a

final nonrenewal decision had not been made in his case, because, until then, he was entitled to expect the College to respond to his letter of September 21, 1970, invoking the procedures of Article 5e to review the Board's initial decision not to renew his contract.

We need not resolve the parties' dispute over the date when Skehan's nonrenewal claim accrued because we agree with the district court's determination that it was governed by the six year period of limitations established in 12 P.S. § 31; thus, whether Skehan's claim is deemed to have accrued in May or in October of 1970, he filed his co plaint well within the period of limitations.

Two recent opinions of this Court compel our disposition of this question. In *Meyers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894 (3d Cir. 1977), this Court faced the question whether a cause of action under 42 U.S.C. §§ 1981 and 1982, alleging racial discrimination by a private home ownership association, was governed by Pennsylvania's two year or its six year statute of limitations. The Court noted that the Pennsylvania scheme of limitations is complex, due to the establishment of a six year period for all actions in contract and all actions of trespass by the Act of 1713, while the Act of 1895, without reference to the earlier statute, provides a two year period for actions for personal injury not resulting in death. The Court noted that the Pennsylvania Supreme Court has held (citing *Walker v. Mummert,* 394 Pa. 146, 146 A.2d 289 (1958) and *Helmig v. Rockwell Manufacturing Co.,* 389 Pa. 21, 131 A.2d 622 (1957)) that the Act of 1713 still governs all actions in trespass not involving personal injury. 559 F.2d at 902. Elaborating further, this Court stated that 12 P.S. § 34 "by its terms applies only to 'actions brought to recover damages' whereas [the plaintiff] seeks a broad range of equitable relief," and that the statutory phrase " 'injury wrongfully done to the person, in cases where the injury does not result in death' expresses a limitation only on actions

for bodily injury whereas [plaintiff's] claim is for tortious interference with his right to contract for the purchase of a house." *Id.* (footnote omitted).

In *Davis v. United States Steel Supply,* 581 F.2d 335 (3d Cir. 1978), this Court reversed a district court decision, relied upon by the defendants here, that had held the two year period of limitations in 12 P.S. § 34 applicable to a cause of action challenging racially discriminatory employment practices brought pursuant to 42 U.S.C. § 1981. Relying on *Meyers, supra,* the *Davis* Court noted that § 34 is applicable only to actions seeking damages for bodily injury. 581 F.2d at 339. The Court held that the plaintiff's cause of action in *Davis,* alleging "an unlawful breach of an existing at-will employment contract" was within the precise terms of 12 P.S. § 31, and was best analogized to "those torts which involve the wrongful interference with another's *economic* rights or interests." *Id.* 339 (footnote omitted) (emphasis supplied).

The district court properly noted that Skehan's claim, like the plaintiff's in *Davis,* most resembled the state law claim of wrongful interference with a contract, and that it did not seek damages for a bodily injury but rather for economic loss. In affirming the district court's determination that 12 P.S. § 31 provides the applicable statute of limitations for Skehan's claim, we also rely on the fact that Skehan did not seek damages alone for the College's allegedly unlawful nonrenewal of his contract, but a broad range of equitable relief as well. *See Meyers, supra,* at 902. We agree with the ruling of the district court denying defendants' motion for judgment on the ground that the first amendment claim was barred by the statute of limitations.[2]

2. We note that Pennsylvania has recently revised its statutes of limitations through the enactment of the Judicial Code. *See* Act of July 9, 1976, P.L. 586, Act No. 142, § 2, 42 Pa. C.S.A. §§ 5501-5574 (Purdon's 1977 Supp.). The new codification went into general effect on June 27, 1978; however, the newly enacted periods of limitation have no effect on an action such as this one that was already pending on the effective date of repeal. *See* Act of July 9, 1976, P.L. 586, Act No. 142, § 25(a).

As noted earlier, the district court, on remand, denied Skehan's motion to take additional testimony on the question whether the College's nonrenewal decision had been based on considerations violative of the first amendment. That order, dated January 10, 1977, was based on the fact that Skehan had rested on all issues presented in his complaint following the preliminary injunction hearing in January, 1973, and that during that earlier hearing he had been presented with a full opportunity to introduce evidence concerning the reasons that may have motivated the nonrenewal decision. In the same order denying Skehan's motion the district court granted defendants' motion to take additional testimony on the question of their official immunity defenses, stating that this question had not been before the court in 1973 and that the law in this area had substantially changed in the interim. Skehan contends that the court's order was an abuse of discretion for a variety of reasons: that it was inconsistent with this Court's remand for findings of fact on the first amendment issue; was unjust given that the court applied a test to the merits of the claim that had been formulated by the Supreme Court in 1977; was inconsistent with the court's decision to allow additional testimony on the defendants' official immunity defense; caused the court to decide the issue on a stale record; was inconsistent with the court's earlier orders respecting pre-trial discovery; and prevented plaintiff from producing a great quantity of probative evidence.

It is clear that "[g]enerally, whether a trial court will reopen a case to take more testimony is discretionary with that court." *Rochez Brothers, Inc. v. Rhoades,* 527 F.2d 891, 894 n.6 (3d Cir. 1975), *cert. denied,* 425 U.S. 993 (1976); *see Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 331 (1971). The contention that Skehan presses most vigorously in arguing that the trial court abused that discretion in this instance is that by not taking

additional testimony on the first amendment claim the district court failed to comply with the mandate of this Court to make findings of fact on the causes of Skehan's nonrenewal. To the contrary, however, neither opinion of this Court specifically instructed the district court to take further evidence on any issue remanded to it for findings of fact. In fact, we feel that there was an assumption implicit in those opinions that the trial court need not reopen the record of this case for further testimony on the first amendment issue in order to make the required findings.

This Court was fully aware that the parties had stipulated that the district court could hold a final hearing on the record developed at the preliminary injunction hearing in January, 1973. *See* 501 F.2d at 37. Yet, it was only with respect to the issue of the individual defendants' official immunity that this Court indicated that the record might have to be reopened in order to make the required factual determinations, and that decision was left to the district court in the first instance. *See* 538 F.2d at 62. Thus, contrary to Skehan's contention that the trial court's denial of his motion to take additional testimony was inconsistent with the mandate of this Court, this Court's failure to specify that further evidence should be taken on remand could, at most, be construed as leaving a decision on the need to reopen the record to the sound discretion of the trial court. *See Rochez Brothers, supra* at 894 (failure of appellate court to instruct the district court to take further evidence indicates that the question was left to the sound discretion of the trial court).

Our scope of review on this question is quite limited. As Professor Moore has stated:

> A district court, then, should consider a motion to take additional testimony in light of all the surrounding circumstances and grant or deny it in the interest of fairness and substantial justice. . . . [T]he grant or denial involves an exercise of discretion by the trial court; and because this court has a feel for the case

> that an appellate court can seldom have, the trial court's ruling is subject to reversal only in a rare case where abuse is clearly shown.

6A *Moore's Federal Practice* ¶ 59.04 [13] at 36-37 (2d ed. 1974) (footnotes omitted). In *Rochez Brothers, supra* at 894 n.6, this Court stated that the district court should be concerned with several factors in deciding whether to reopen a case, including the burden which would be placed on the parties and their witnesses, undue prejudice which might result by a refusal to take new testimony, and considerations of judicial economy.

The district court was clearly concerned with the burdens placed on the parties and the court system by the failure of that system to dispose of the dispute in this case promptly and fairly. That theme is prominent throughout the court's numerous pre-trial orders attempting to bring the parties into court for resolution of the issues remanded by this Court. Following a final pre-trial conference on December 1, 1976, the court directed that the parties file motions for the taking of such additional testimony on those issues as they deemed advisable. In spite of Skehan's contention to the contrary, we do not find that the district court in prior orders had indicated to the parties that there would be further testimony taken on the first amendment issue. In its order of January 10, 1977, the court, after considering all the points raised here by Skehan, save one that is discussed below, denied his motion to reopen the record on the first amendment nonrenewal claim. The court relied on the fact that Skehan had had a full opportunity to present evidence on the defendants' motivation in declining to renew his contract beyond 1970-71 at the preliminary injunction hearing; any responsibility for inadequacies in that presentation was deemed to rest with Skehan. Furthermore, the court determined that the real thrust of Skehan's request was to insure that he would have an opportunity to rebut any evidence offered by the defendants on the question of their official immunity from

an award of damages arising from the alleged first amendment violation. The court offered Skehan the opportunity to present such rebuttal evidence if the issue of official immunity from liability were to arise.

We believe that the concerns raised here by Skehan, and rejected by the district court, do not compel a conclusion that the trial court abused its discretion in denying his motion to take additional testimony on the first amendment nonrenewal claim. This is not one of the exceptional cases envisioned in *Rochez Brothers, supra* at 894-95, in which a party failed to put into evidence all the necessary elements of his claim because of a misunderstanding among the parties and the trial court; nor was the trial court unable to make findings of fact on the nonrenewal claim without the proffered testimony. *See Pittsburgh Press Club v. United States,* 426 F. Supp. 553, 554 (W.D. Pa. 1977), *aff'd in relevant part,* 579 F.2d 751, 755 (3d Cir. 1978). Rather, as Skehan concedes, at the time of the preliminary injunction hearing, the district court and the parties probably considered the question of the College's motivation in its nonrenewal of Skehan to be merged with the first amendment challenge to his dismissal. Thus, Skehan did present evidence with respect to his first amendment activities, and the College's reaction to them, relevant to the whole period of his employment by the College. The district court in no way hindered him from offering proof that the nonrenewal decision was motivated by his engaging in conduct protected by the first amendment. Skehan's counsel made a tactical judgment to rest on the record made at the preliminary injunction hearing and, based on that record, the district court was able to detail Skehan's campus activism prior to the nonrenewal decision in the Spring of 1970 in twelve findings of fact contained in its opinion on the merits of the first amendment claim, discussed below.

Skehan has presented one contention for the consideration of this Court that, of necessity, he did not present to the district court prior to its order of January 10, 1977.

That contention is that the district court should have reversed its order denying his motion to present additional testimony on the first amendment issue when it became aware of the change in the law represented by the decision of the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The *Mt. Healthy* decision was issued by the Supreme Court on January 11, 1977, one day after the district court's order denying Skehan's motion, but prior to the court's ruling on the merits of the first amendment claim on March 24, 1977, in which it relied on the test of causation formulated in *Mt. Healthy*.

Skehan is correct in his assertion that a change in legal standards may warrant the reopening of a case where additional testimony would be pertinent to the change of law. *See* 6A *Moore's Federal Practice* ¶ 59.04[13] at 36 (2d ed. 1974). In fact, the district court relied on this ground in deciding to grant the defendants' request to take additional testimony on the official immunity defense. However, we believe that the *Mt. Healthy* decision did not reflect a change in the law that would warrant the district court's reopening of the record in this case to allow Skehan to present additional testimony on his claim that the defendants' decision not to reappoint him beyond 1970-71 violated the first amendment.

Mt. Healthy did not substantially affect the affirmative burden of a plaintiff in Skehan's position to show by a preponderance of the evidence that his first amendment activities were a substantial or motivating factor in an adverse employment decision. The standard of proof adopted in *Mt. Healthy* is, if anything, more stringent than the standard applied by the district court in its ruling in 1973 that Skehan had failed to prove he had been terminated for reasons violative of the first amendment, 358 F. Supp. at 434—a ruling affirmed by this Court, 501 F.2d at 39. To the extent the *Mt. Healthy* Court adopted a "new" formulation of the test of causation for claims alleging dismissal from public employment for reasons violative of the first amendment, the "new" aspect of that formulation was the Court's holding that the defendants in such a case must be afforded an opportunity to rebut a prima facie case of impermissible motivation by showing by a preponderance of the evidence that they would have reached the same decision even in the absence of the constitutionally protected conduct of plaintiff. 429 U.S. at 284-87. Because Skehan was permitted to adduce all testimony relevant to his first amendment nonrenewal claim at the preliminary injunction hearing, and because no evidence pertinent to his affirmative case after *Mt. Healthy* would not have been equally pertinent then, we cannot say that Skehan was prejudiced by the court's application of a "new" legal standard to his first amendment claim.

We conclude that it was not an abuse of discretion for the district court to have declined to reopen that aspect of the record of this case dealing with Skehan's claim that the College's decision not to renew his appointment beyond 1970-71 violated the first amendment.

C. *The Merits of the First Amendment Claim*

The district court found that the evidence adduced by Skehan at the preliminary injunction hearing failed to establish by a preponderance of the evidence that his constitutionally protected conduct was a "substantial" or "motivating" factor in the decision of the Board of Trustees to offer him a terminal contract for the 1970-71 academic year. *See Mt. Healthy, supra* at 287. Furthermore, the court went on to find that even if Skehan had met that initial burden, the defendants had shown by a preponderance of the evidence that Skehan's contract would not have been renewed beyond that year even if he had not spoken out on campus issues. *See id.* Having concluded that the court's findings on Skehan's failure to meet his initial burden of proof are not clearly erroneous, we affirm the court's judgment on the first amendment nonrenewal issue.

The district court found as a fact that "Dr. Skehan assumed an activist position on many of the issues raised in the campus community, a position often grating to the administration of Bloomsburg State College." However, the court also found:

> There is no evidence on the record to establish that the Board of Trustees based their decision not to renew Skehan's contract on his criticism of administrative policies or his comments on campus issues. Skehan has shown only that after he spoke out on campus issues his contract was not renewed. No evidence establishing a relationship or nexus between the two events has been presented.

Unpublished opinion of March 24, 1977, at 14.

Skehan argues that the district court's finding that there was no evidence connecting the College's nonrenewal decision with his first amendment activities should be set aside as clearly erroneous. He relies on the following passage from Dr. Nossen's letter to him, dated October 9, 1970, informing him that he was being relieved of classroom responsibilities for his actions during the scheduling dispute, as proof of the nexus the district court found lacking:

> I hardly need remind you that you are, during this current year, on terminal appointment. You were, at the time that appointment was offered, advised that your *previous disruptive activities* made your presence on this campus unwelcome, and the hope was expressed that you would not accept. [emphasis supplied].

Skehan contends that those "previous disruptive activities" must have been a reference to activities protected by the first amendment and that the foregoing passage proves that the College's nonrenewal decision was substantially motivated by considerations violative of the Constitution.

The district court found, however, that the phrase could have been a reference to Skehan's refusal to meet his classes at the appointed times. There was testimony introduced at the preliminary injunction hearing by Skehan's department chairman that prior to Skehan's nonrenewal he had arranged, without approval and contrary to past instructions, to have other faculty members take charge of his classes.

It is also possible that the "disruptive activities" referred to by Dr. Nossen in his letter of October 9 were the same activities he mentioned in an earlier letter of June 15, 1970, admitted into evidence at the preliminary injunction hearing as defendants' exhibit 12. In that letter, reaffirming the Board of Trustees' determination that Skehan's appointment for the 1970-71 academic year was to be a terminal contract, Dr. Nossen stated:

> The Board members have expressed deep concern over your continued failure to cooperate with your Department Chairman, to meet established departmental deadlines, and to contribute to constructive departmental operation. Your Chairman has, in desperation, requested that you no longer attend departmental meetings and that you report, should you return for 1970-71, to the Dean of Instruction rather than to him.

Whatever the true meaning of the phrase "disruptive activities" in the October 9 letter might be, we can find no error in the district court's determination that Skehan failed to establish by a preponderance of the evidence that Dr. Nossen acted to prevent the renewal of Skehan's contract because of his disagreement with Skehan's avowed positions on campus issues. Moreover, there is no evidence that the members of the Board of Trustees were even aware of Skehan's first amendment activities at the time they approved the decision not to renew his contract. Such a failure of proof requires that we credit the district

court's evaluation of the testimony and affirm, as not clearly erroneous, its finding of fact that "Skehan's criticism and disagreement with the administration, specifically Dr. Nossen and the Board of Trustees . . . concerning certain campus issues . . . was not a motivating or substantial factor in the decision not to renew his contract of employment beyond the 1970-1971 year." Unpublished opinion of March 24, 1977, at 7. *See Franklin v. Atkins,* 562 F.2d 1188, 1192 (10th Cir. 1977); *cf. Mazaleski v. Treusdell,* 562 F.2d 701, 716 (D.C. Cir. 1977) (*Mt. Healthy* requires that a dismissed public employee's first amendment claim be supported by more than *post hoc ergo propter hoc* allegations).

Having considered all of Skehan's arguments pertinent to this aspect of his appeal, we concur in the conclusion of the district court that Skehan did not establish that his first amendment activities were a substantial or motivating factor in the College's decision not to renew his contract beyond 1970-71. We need not review the district court's determination that, even if Skehan had established a prima facie case of a first amendment violation, the defendants proved by a preponderance of the evidence that he would have been offered a terminal contract based on reasons independent of his constitutionally protected conduct.

II. The Article 5e Procedural Due Process Claim

On April 14 and 15, 1977, the district court heard testimony without a jury concerning, *inter alia,* the nature of the interest created by Article 5e of the College's Statement of Policy for Continuous Employment and Academic Freedom, and whether Skehan's right to a hearing under Article 5e had been violated by defendant Nossen's failure to institute the proceedings called for by that provision upon receipt of Skehan's letter of September 21, 1970. In an opinion issued on May 18, 1977, the district court held that Skehan possessed a contractual right to the

procedures set forth in Article 5e, that he had invoked that right within a reasonable time, and that the College's failure to afford Skehan those procedures violated the due process clause of the fourteenth amendment. *Skehan v. Board of Trustees of Bloomsburg State College,* 431 F. Supp. 1379, 1391 (M.D. Pa. 1977).

The defendants' cross-appeal raises two challenges to that holding: first, they assert that the district court should not have considered the Article 5e claim, even though this Court had specifically instructed that it do so, because the claim was never raised by Skehan at any stage of this litigation; second, they contend that Skehan did not have a contractual right to the procedures set forth in Article 5e because the College's Statement of Policy was not a contract supported by consideration nor one whose obligations were set forth with sufficient certainty, because it had not been practical for the College to adhere to those procedures in Skehan's case, because Skehan's behavior during the scheduling dispute had discharged the College's obligation to provide him with an Article 5e hearing and because Skehan's letter to President Nossen was not a proper invocation of Article 5e. If we reverse the district court's finding that Skehan was contractually entitled to the procedures set forth in Article 5e, the defendants rightly conclude that Skehan would have no property interest in those procedures rising "to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9 (1978).

A. *Skehan's Alleged Failure to Raise the Article 5e Claim*

The defendants argue that the district court's holding in Skehan's favor on the procedural due process claim should be reversed because it was error for the court to have addressed that issue in the first instance. The district court noted in its opinion on this issue that the Article 5e claim was never set forth in Skehan's complaint, never

raised at the preliminary injunction hearing in January, 1973, never raised before this Court, and, in fact, "first surfaced in the Opinion of the Court of Appeals." 431 F. Supp. at 1382. The court also stated its view that Skehan's failure to raise the claim in his complaint ran afoul of the requirement that facts be pleaded with specificity in civil rights actions, and that the "creation" of the issue by this Court was inconsistent with our jurisprudential system. *Id.* Nonetheless, the court felt itself bound by the directions of this Court to fully consider the issue as though it had been initially raised by Skehan in his complaint.

Defendants rely on the foregoing observations of the district court as support for their argument here. Based on our independent review of the record of the preliminary injunction hearing, we decline to accept the validity of the district court's observations. Moreover, in the unanimous panel opinion of this Court entered on May 3, 1974, we stated that Skehan had presented a due process claim based on the College's failure to provide him with an Article 5e hearing and that the district court had failed to make findings of fact on that claim. 501 F.2d at 38. Thus, this Court remanded the case to the district court for findings "as to the nature of the interest created under Pennsylvania law by article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College . . . ." *Id.* 45. In our unanimous en banc opinion on remand from the Supreme Court, we again directed that findings be made on the Article 5e issue. 538 F.2d at 63. The defendants did not seek review of the original order of this Court; their petition for certiorari to the Supreme Court, filed after the issuance of our opinion en banc, did not raise the contention they now press that this Court impermissibly created the Article 5e issue *sua sponte*. Thus, even if we were to agree with the defendants' contention and the district court's observations, we would have to rule that this Court's prior opinions represent the law governing this case with respect to the question whether it was permissible to remand the Article 5e claim to the district court.

B. *The Merits of the Article 5e Due Process Claim*

The district court held that the College's Statement of Policy "sets forth its purpose in terms that meet the general requirement that a contract be supported by consideration." 431 F. Supp. at 1388. The court found that the Statement had been adopted by the College to insure the more effective services of faculty members, and that during the period in which it was in effect each faculty member was given a copy of the Statement at the start of his term of employment and was asked to acknowledge in writing his familiarity with its provisions. *Id.* 1387-88. Thus, the court found the Statement to be an integral part of the contractual structure defining the employment relationship between the College and its faculty.

The defendants dispute the district court's characterization of the Statement as a contract, arguing that under Pennsylvania law it was not an enforceable agreement, but rather an "illusory promise," lacking in certainty with respect to the nature and extent of the obligations of the parties thereto. They base this argument on a clause in that section of the Statement's preamble labeled "*Purpose*," which provides: "It is understood that this is a statement of policy which will be honored in all practical situations." Because the College was required by the Statement to follow its procedures only when "practical" they argue that it was a promise merely in form.

The district court held, to the contrary, that the phrase "practical situations" can easily be interpreted by a factfinder and, hence, its presence in the Statement did not render its provisions unenforceable but rather permitted the College to avoid its obligations only by establishing that compliance in a given case was impractical. 431 F. Supp. at 1388. We believe the district court's ruling

on this question to be consistent with applicable Pennsylvania law. *See Kirk v. Brentwood Manor Homes, Inc.*, 191 Pa. Super. Ct. 488, 159 A.2d 48, 51 (1960).

The holding of the district court that the College's Statement of Policy was not an illusory promise, but a binding agreement that permitted the College to avoid its obligations thereunder only by establishing proof of impracticality, carries into effect the reasonable intention of the parties, articulated in the preamble of the Statement, that its provisions were adopted to protect the economic security of the faculty members at Bloomsburg State. That holding also comports with the determination of the Pennsylvania Supreme Court that in the area of contract enforceability the maxim "'*id certum est quod certum reddi potest*' (that is certain which can be made certain)" should be applied. *Portnoy v. Brown*, 430 Pa. 401, 243 A.2d 444, 447 (1968).

The defendants also argue that the College had, in fact, determined that it would be impractical to comply with Article 5e in Skehan's case and that, absent proof that they had abused their discretion in making that determination, the district court should have respected their decision. They also defend the merits of their decision, arguing that it would have been impractical to afford Skehan an Article 5e hearing when he requested it on September 21, 1970, because he was, at that time, embroiled in the scheduling dispute with the College administration that ultimately led to his dismissal.

Findings of fact made by the district court, and supported by the testimony of President Nossen, belie the claim that the appropriate officers of the College made a reasoned determination that emergency conditions caused by Skehan's refusal to comply with administrative directives concerning the scheduling of classes compelled them not to comply with Article 5e in spite of Skehan's request that they do so. Rather, President Nossen did not respond to Skehan's invocation of Article 5e because he assumed,

without reading the Statement, that the College's Committee on Professional Affairs was the appropriate body to initiate such proceedings. 431 F. Supp. at 1385. The district court also found that no evidence had been presented by the defendants in support of their contention that, given the scheduling dispute, it had been impractical for the College to implement the procedures of Article 5e in Skehan's case. *Id.* 1388. Thus, we find no error in the district court's determination that the defendants did not establish that proof of impracticality needed to avoid their contractual obligation to provide Skehan an Article 5e hearing.

Alternatively, the defendants argue that they were discharged from performing their contractual obligations to Skehan because he had materially breached his contract with the College by his actions during the scheduling dispute. This Court has already affirmed a prior holding of the district court that Skehan's participation in that dispute was a valid substantive ground for his dismissal, at least as a matter of constitutional law. 501 F.2d at 39. Skehan's dismissal is not at issue here, however; the claim now before this Court is that he was contractually entitled to a hearing into the reasons for his earlier nonrenewal. He requested such a hearing on September 21, 1970, which was found by the district court to be a reasonable time to initiate a complaint concerning his nonrenewal given that he was not formally notified of the Board's nonrenewal decision until May 19, 1970, and that the academic year ended on May 24 of that year. (The defendants do not challenge before this Court the reasonableness of the timing of Skehan's invocation of Article 5e.) Dr. Nossen did not deem it necessary to relieve Skehan of his classroom responsibilities because of his actions during the scheduling dispute until October 9, 1970. His preliminary decision to completely terminate the College's contractual relationship with Skehan was made on October 19, 1970, and affirmed by the College's Board of Directors on October 23. Thus, the record establishes that the defendants did not decide

that Skehan's actions justified their termination of the College's contractual obligations to him until some four weeks after he had requested an Article 5e hearing. Under such circumstances we cannot agree that the defendants were discharged from their contractual obligations with respect to Skehan's challenge to his nonrenewal at any time prior to the date on which the College itself decided to treat his contract as terminated. During the interval between September 21 and October 19, 1970, Dr. Nossen made no attempt to set into motion the procedures of Article 5e. We agree with the holding of the district court that the College was not discharged from its obligation to do so by Skehan's failure to obey administrative directives during the scheduling dispute. We feel supported in this ruling by the observation of the district court that the very purpose of Article 5e would be defeated if the College were permitted to deny a faculty member a hearing on the causes of his nonrenewal whenever it asserted that his failure to perform his obligations to the College discharged the College's obligation to comply with Article 5e. 431 F. Supp. at 1388.

Finally, the defendants contend that it was error for the district court to hold that Skehan's letter of September 21, 1970, served as a proper invocation of Article 5e. They argue that the plain language of 5e and its context within the Statement of Policy supports their position that its proceedings were to be initiated by a letter to the College's Committee on Professional Affairs. The district court disagreed, finding the language of 5e to be ambiguous on the appropriate method of initiating its procedures, and holding that, although Skehan should have submitted a copy of his letter to the Committee, his failure to do so did not excuse the College's failure to act upon his request for a hearing. 431 F. Supp. at 1389. We believe that the district court's decision was amply supported by the terms of Article 5e and Skehan's letter.

Article 5e provided that the President of the College was required to explain to a nontenured faculty member

the basis of a nonrenewal decision if that faculty member alleged an infringement of academic freedom. It also provided that such an allegation "shall be given preliminary consideration by the Committee on Professional Affairs . . . ." *See* note 1 *supra*. In his letter to Dr. Nossen Skehan stated: "I hereby invoke article 5e . . . affirming that the decision not to re-appoint me has been caused by considerations violative of academic freedom." There was testimony given at the preliminary injunction hearing by a former dean of the College that upon receipt of Skehan's letter it would have been the President's responsibility to refer the matter to the Committee on Professional Affairs. Thus, there is evidence to support the district court's implicit holding that, given the ambiguity in the language of Article 5e, Skehan's pointed invocation of its procedures by letter to the President of the College was an appropriate means to initiate those procedures.

The district court held that Skehan had a property interest in the procedures of Article 5e and that the failure of the College to initiate those procedures upon his request violated the due process clause of the fourteenth amendment. The court's conclusions are consistent with applicable Pennsylvania law and with the purpose of the Statement of Policy to provide a procedural structure to the College's employment relationship with its faculty. The district court's finding that the College breached its contractual obligations in Skehan's case, and hence violated procedural due process, is amply supported by the record. Thus, we affirm that aspect of the district court's judgment and proceed to a consideration of whether the relief awarded Skehan by the district court was appropriate.

III. Relief

A. *The Present Posture of this Case*

In its en banc opinion this Court decided that any award of back pay to which Skehan was otherwise entitled

from the College itself was barred by the eleventh amendment. This holding was based on the decision of the Pennsylvania Commonwealth Court in *Brungard v. Hartman,* 12 Pa. Commw. Ct. 477, 315 A.2d 913 (1974), that state colleges are agencies for which Pennsylvania claims sovereign immunity. The College's sovereign immunity status under state law was deemed by this Court to be dispositive of the eleventh amendment immunity issue as well. 538 F.2d at 62.

This Court did direct the district court to consider an award of back pay against the individual defendants in this case; the availability of such an award would depend upon each defendant's ability to establish that he acted in good faith and without malice under the official immunity doctrine. The period for which back pay could be awarded was to depend upon the district court's findings as to Skehan's constitutional challenges to his nonrenewal. Thus, this Court directed that "[i]f Skehan's only contract right expired by its terms at the end of the 1970-71 academic year, and there was no first amendment violation, a back pay award . . . covering the 1970-71 period, must be considered." *Id.* 63. On the other hand, "[i]f either the article 5(e) claim or the first amendment claim should be decided in Skehan's favor, the court should consider the award of back pay to date against the individual defendants, and also prospective reinstatement . . . at least until appropriate college termination procedures have taken place." *Id.*

We also directed that an award of attorney's fees be considered against the individual defendants for bad faith, vexatious, wanton or oppressive conduct either prior to or during the course of this litigation, and against the College for such conduct during this litigation. Subsequent to our en banc opinion, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, and in the proceedings on remand Skehan based his fee request on that statutory provision.

The district court was not required to consider the amount of back pay to which Skehan was entitled for the violations of his right to procedural due process with respect to either the nonrenewal or the termination decision because Skehan was not successful in the proceedings below in establishing the liability of any defendant for damages arising from those violations. He was also unsuccessful in his effort to recover attorney's fees because the district court held that sovereign immunity barred a fee recovery from the College, and it exercised its discretion under the Awards Act to deny Skehan an award of fees from the individual defendants. The court did prospectively reinstate Skehan to a suspended with pay status at the College, pending the completion of nonrenewal and termination proceedings. Various aspects of the district court's award of relief and this Court's instructions with respect to that award have been raised as grounds of appeal by the parties here.

B. *Sovereign Immunity*

In spite of this Court's holding that Bloomsburg State College is an entity of the Commonwealth of Pennsylvania to which sovereign immunity attaches, Skehan asked the district court to consider his claim for monetary relief against the College. In its opinion on the remedial aspects of this case, filed on July 20, 1977, the district court, deeming itself bound by our earlier holding, refused to entertain Skehan's argument that this Court had erred. *Skehan v. Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657, 665 (M.D. Pa. 1977). We, too, are bound by the determination of this Court en banc unless intervening decisions of the Supreme Court, acts of Congress, or changes in applicable state law require us to reconsider our prior holding.

Although Skehan was unable to present any arguments based on the effects of intervening law on the sovereign immunity issue to the district court, he argued before this

Court that the eleventh amendment immunity of the College has been waived both by the effects of a recent decision of the Pennsylvania Supreme Court and by recent decisions of the United States Supreme Court. We shall consider the effects of this intervening decisional law on our earlier holding that the eleventh amendment bars an award of monetary relief against the College in this case. We do so in the light of the Supreme Court's admonition that " 'an appellate court must apply the law in effect at the time it renders its decision.' " *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 714 (1974), *quoting Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969).

1. Intervening State Law

We shall first address Skehan's argument based on changes in the applicable state law. He contends that the decision of the Pennsylvania Supreme Court in *Mayle v. Pennsylvania Department of Highways*, — Pa. —, 388 A.2d 709 (1978), entered on July 14, 1978, constituted consent by the Commonwealth of Pennsylvania and all its agencies to be sued in federal court.

The eleventh amendment has been construed by the Supreme Court not to bar an action in federal court against the state or its officers acting in their official capacities for prospective injunctive relief from unconstitutional state actions. *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Ex parte Young*, 209 U.S. 123 (1908). Thus, this Court earlier held that the eleventh amendment presented no impediment to Skehan's request for prospective reinstatement as relief for the constitutional violations he established. 538 F.2d at 63. However, *Edelman* made it clear that, absent consent to suit by the state, a federal court may not award relief against state officers or agencies that constitutes a compensatory money judgment payable out of the state treasury, even if that relief is labeled as equitable in nature. 415 U.S. at 666.

Skehan does not challenge this Court's earlier holding that his request for a back pay award from the College is the type of retroactive monetary relief proscribed by *Edelman;* rather, he contends that the Pennsylvania Supreme Court waived the Commonwealth's immunity to such an award in the *Mayle* decision. Although it cannot be gainsaid that a state may waive its constitutional protection under the eleventh amendment, *see Edelman, supra* at 673, events subsequent to the decision in *Mayle* make it clear that Pennsylvania has not consented to the imposition of the type of monetary relief sought by Skehan in this case.

In *Mayle* a divided Pennsylvania Supreme Court "abrogated" the doctrine of sovereign immunity, whereby the Commonwealth had previously been immune from liability arising from the torts of its agents except where a legislative act authorized recovery. — Pa. at —, 388 A.2d at 709-10. The court held that sovereign immunity in Pennsylvania was a non-constitutional doctrine that had its origins in judicial decisions, and that neither the state constitution nor legislative enactments precluded the court from abolishing the doctrine it had created and overruling all prior inconsistent opinions. *Id.* at — - —, 388 A.2d at 718-20.

Skehan argues that although the *Mayle* opinion did not in terms address the applicability of its holding to the Commonwealth's eleventh amendment immunity from suits for damages in federal court, it should be construed to waive Bloomsburg State's immunity here because the language of *Mayle* rejects the sovereign immunity doctrine and its justifications in broad terms, and because the opinion relies in part upon the refusal of the Pennsylvania legislature to ratify the eleventh amendment when it was proposed by Congress in 1794. *See* — Pa. at —, —, 388 A.2d at 712, 718.

The Supreme Court has held that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only

where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman, supra* at 673, *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). This rule has been applied to cases in which a state has consented to suit in its own courts by statute; consent to a similar suit in the federal courts has not been inferred absent a clear declaration in the statutory language that the state intended to waive its eleventh amendment immunity as well as its sovereign immunity under state law. *See Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577 (1946); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 465 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944).

We would face an apparently novel application of this rule were we required to interpret the effect of a state's abrogation of its state law sovereign immunity by judicial decision on its eleventh amendment immunity from damage actions in federal court. *See Greenfield v. Vesella*, 457 F. Supp. 316, 319-20 (W.D. Pa. 1978) (holding that the decision in *Mayle* has waived the Commonwealth's eleventh amendment immunity). Recent action by the Pennsylvania legislature has precluded our need to enter this thicket.

On September 28, 1978, the Pennsylvania legislature enacted House Bill No. 2437, Act No. 1978-152, reaffirming and preserving sovereign immunity as a bar to claims brought against the Commonwealth and its agencies, officials, and employees. *See* 1978 Pa. Legis. Serv. 629-36. Section 2 of that Act amends the Judicial Code, Act of July 9, 1976, P.L. 586, Act No. 142, 42 Pa. C.S.A., by adding new sections 5110 and 5111, limiting the scope of the Commonwealth's waiver of sovereign immunity to particular types of actions and limiting recovery to particular types of damages. Section 5(a) of the Act, entitled "Construction and Application," states the legislature's intent that the Act "specifically respond to and prescribe limitations

on the decision of Mayle v. Commonwealth . . . ." Moreover, section 5(b)(1) bars any cause of action against the Commonwealth not permitted under 42 Pa. C.S.A. § 5110, regardless of when it arose, unless it would not have been barred by applicable statutory or decisional law prior to the *Mayle* decision. Finally, section 5(e) provides that "[n]othing contained in this act shall be construed to waive the Commonwealth's immunity from suit in Federal courts guaranteed by the eleventh amendment to the United States Constitution." The Act went into effect on the date of its enactment, September 28, 1978.

In enacting the foregoing statutory provision the Pennsylvania legislature has effectively overruled the decision of the Pennsylvania Supreme Court in *Mayle*. Thus, for Skehan to prevail in his argument that intervening changes in Pennsylvania law require us to disregard the earlier determination of the en banc Court on the sovereign immunity issue he would have to demonstrate that state colleges like Bloomsburg State are no longer deemed to be agencies cloaked with the Commonwealth's sovereign immunity. Nothing in the new sovereign immunity statute suggests such a result and recent decisions of the Pennsylvania Commonwealth Court have reaffirmed the holding of *Brungard v. Hartman* to the contrary. *See Finkelstein v. Shippensburg State College*, — Pa. Commw. Ct. —, 370 A.2d 1259 (1977); *Williams v. West Chester State College*, — Pa. Commw. Ct. —, 370 A.2d 744 (1977). Our previous ruling that Bloomsburg State College cannot be made liable to Skehan for an award of back pay will not be disturbed on the ground of intervening changes in applicable state law.

2. Intervening Decisions of the Supreme Court

Skehan also argues that the Supreme Court's holding in *Monell v. Department of Social Services of City of New York*, — U.S. —, 98 S. Ct. 2018 (1978), that local governmental units may be deemed "persons" within the mean-

ing of 42 U.S.C. § 1983 compels the conclusion that § 1983 now must be construed as a valid Congressional waiver of the states' eleventh amendment immunity to suits for damages in federal court. Thus, he requests this Court to make a determination as to the College's status as a "person" liable to an award of damages under § 1983. Because we do not believe that the necessary implication of the *Monell* decision is an overruling of prior Supreme Court cases holding that § 1983 does not abrogate the states' eleventh amendment sovereign immunity, we find it unnecessary to make the requested finding as to the College's status as a § 1983 "person."

In ruling on Skehan's argument here it is necessary to first review recent opinions of the Supreme Court touching upon the legislative authority of Congress to impose upon the states consent to being sued in actions otherwise barred by the eleventh amendment. *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964), is the seminal case in this area. There the Supreme Court held that Alabama had consented to a suit for damages under the Federal Employers' Liability Act brought by an employee of a state-owned interstate railroad who had sustained injuries in the scope of his employment. The Court's holding was based on the fact that the F.E.L.A. was a congressional enactment which by its terms authorized suit against a general class of defendants literally including states and state instrumentalities, and the fact that Alabama began to operate an interstate railroad twenty years after the passage of the Act. *See Edelman v. Jordan, supra* at 672.

In *Edelman, supra,* the Court of Appeals had held that *Parden* compelled a similar finding of consent to suit waiving the eleventh amendment. There plaintiffs had sued under 42 U.S.C. § 1983 for retroactive payment of welfare benefits allegedly withheld from them by the Illinois Department of Public Aid in violation of applicable federal laws and the equal protection clause. The Court of Appeals held, and three dissenters from the Supreme

Court's reversal of that holding agreed, that § 1983 created a private cause of action to enforce the applicable provisions of the Social Security Act, and that the state's participation in the federally assisted welfare program constituted constructive consent to suits challenging the state's failure to comply with the terms of participation in that program. *See Edelman v. Jordan, supra* at 688-96 (Marshall & Blackmun, JJ., dissenting); *id.* 678-87 (Douglas, J., dissenting).

The Court majority disagreed, however, holding that a federal court's remedial power under § 1983 was limited by the eleventh amendment to awarding prospective injunctive relief against the state, absent "the threshold fact of congressional authorization to sue a class of defendants which literally includes States . . . ." *Id.* 672. Section 1983 was held by the Court not to be such an authorization because it was not deemed to authorize suits against the states themselves but only against state officers. *Id.* 675-77.

In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the Court was faced with the question whether the eleventh amendment proscribed Congress' authorization of suits for backpay awards brought by employees against state governmental bodies found to have violated the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Congress had amended Title VII to include governmental bodies within the Act's definition of employers through passage of the Equal Employment Opportunity Act of 1972. The Second Circuit had held that insofar as the amendments to Title VII authorized a private action for the recovery of damages against the states they were unconstitutional under the interpretation of the eleventh amendment adopted by the Supreme Court in *Edelman.*

The Supreme Court, in unanimously reversing that judgment, noted that in *Fitzpatrick* "[o]ur analysis begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' . . .

to sue the State as employer is clearly present." 427 U.S. at 452. The Court reiterated that neither the Social Security Act nor § 1983 had provided that threshold predicate to a finding of eleventh amendment waiver in *Edelman*. The Court explained that § 1983 had not been read as such an embodiment of congressional intent to abrogate sovereign immunity because "it had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, *it could not have been intended to include States as parties defendant.*" 427 U.S. at 452 (emphasis supplied).

Having found the predicate of congressional authorization that was absent in *Edelman* to be present in *Fitzpatrick*, the Court went on to hold that Congress' imposition of suit against the states in the Title VII amendments was a valid exercise of its power under § 5 of the fourteenth amendment "to enforce, by appropriate legislation, the provisions" of that amendment:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan*, 415 U.S. 651 (1974) . . . .

427 U.S. at 456 (citations and footnote omitted).

Significantly, in this context of Congress' exercise of its enforcement powers under § 5 of the fourteenth amendment, the Court did not even discuss the requirement earlier expressed in *Parden* and *Edelman* that a valid waiver of the state's eleventh amendment immunity depends upon its consent to congressional authorization of damage actions by private parties against state defendants. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1235-37 (1978).

Justices Brennan and Stevens separately concurred in the Court's judgment in *Fitzpatrick* on grounds not applicable to our discussion here. *See* 427 U.S. at 457-58 (Brennan, J., concurring); *id.* 458-60 (Stevens, J., concurring).

Skehan's argument is that the Supreme Court's decision in *Monell* last term, overruling *Monroe v. Pape*, removed any distinction between *Edelman* and *Fitzpatrick* and, in effect, overruled *sub silentio* the holding in *Edelman* that § 1983 was not a congressional authorization of suits against a class of defendants literally including states.

We need not review here the Supreme Court's analysis of the legislative history of § 1983 in *Monell* that led it to its conclusion "that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." — U.S. at —, 98 S. Ct. at 2035 (footnote omitted; Court's emphasis). However, we should note that the Court also held that "the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. [I]n other words, a municipality cannot be held liable under § 1983 on a *respondeat superior*

theory." *Id.* at —, 98 S. Ct. at 2036. Rather, the Court concluded that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at —, 98 S. Ct. at 2038.

The possible effect of this holding on the eleventh amendment sovereign immunity doctrine was not addressed by the Court; the *Monell* holding was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Id.* at —, n.54, 98 S. Ct. at 2035 n.54. In the case before us today we are confronted with a local government defendant that has been held to share in the eleventh amendment sovereign immunity of the Commonwealth of Pennsylvania. However, Bloomsburg State College's status as a person under § 1983 has not been previously determined by this Court or the district court; up until now subject matter jurisdiction over the College in this case has been affirmed only under the general federal question jurisdiction of 28 U.S.C. § 1331. *See* 501 F.2d at 44. If we were to accept Skehan's contention that *Monell* overruled *Edelman sub silentio* on the question of § 1983's effect on the state's eleventh amendment immunity it might first be necessary to remand this case to the district court with instructions to determine the College's liability as a § 1983 defendant under the guidelines set forth in *Monell*. *See Norris v. Frame*, — F.2d —, No. 78-1090, slip op. at 5 n.8 (3d Cir., filed Oct. 31, 1978).

Such a remand is unnecessary in this case because, absent a much clearer statement by the Supreme Court to the effect that § 1983 must now be construed as waiving the states' sovereign immunity from awards of monetary damages, this Court considers itself bound by the holding of *Edelman* to the contrary. We note that of the present members of the Supreme Court, Justice Brennan has expressed his view that it is at least an open question whether

Edelman has been overruled by *Monell*. *See Hutto v. Finney*, — U.S. —, — - —, 98 S. Ct. 2565, 2579-81 (1978) (Brennan, J., concurring). Justice Powell, joined by the Chief Justice and Justices White and Rehnquist, has argued, to the contrary, that the vitality of the *Edelman* holding has not been undermined *sub silentio* by *Fitzpatrick* and *Monell*. *See id.* — n.6, 98 S. Ct. at 2583 n.6 (Powell, J., concurring in part and dissenting in part). Thus, the conclusion that *Edelman* is no longer good law is certainly not an inescapable one. We feel that it would be inappropriate for this Court to hold that *Edelman* has been overruled by *Monell*, an opinion issued only four years later, when such a result was not even intimated by the authors of the majority, concurring and dissenting opinions in *Monell*. We conclude that Skehan's argument that the College's sovereign immunity has been waived by the congressional imposition of suits upon the states in § 1983 is precluded by the Supreme Court's opinion in *Edelman v. Jordan*.

Thus, our prior determination that Skehan is not entitled to a back pay award against the College because of its status as an agency of the Commonwealth to which eleventh amendment sovereign immunity attaches will not be disturbed.

C. *Official Immunity*

On remand from this Court the district court heard additional testimony on the question of the defendants' good faith in failing to comply with Skehan's request for an Article 5e hearing and in terminating his employment with the College without a prior hearing. *See* Part I,B *supra*. That the defendants violated procedural due process with respect to Article 5e has today been affirmed by this Court, *see* Part II *supra;* we earlier affirmed that the defendants violated procedural due process by terminating Skehan's employment during the term of his contract without a prior hearing, *see* 501 F.2d at 38.

In its opinion issued on May 18, 1977, the district court concluded, based on its findings of fact, that defendant

Nossen's actions with respect to both violations of procedural due process established by Skehan had been taken in good faith and without malicious intention. The court also concluded that he had acted in a reasonable manner and had not violated clearly established constitutional rights with respect to either denial of due process. 431 F. Supp. at 1391. In its later opinion, entered on July 20, 1977, the court stated that the only individual defendant from whom Skehan had sought monetary damages was President Nossen, and because he and the College were both immune from liability, the court was unable to award Skehan any relief in the nature of backpay. 436 F. Supp. at 659. Skehan challenges both the district court's refusal to address the question of the liability of each individual defendant in this case, and its findings and conclusions with respect to Nossen's immunity from liability.

Language in this Court's en banc opinion indicated our belief that the district court would be required to consider the availability of the official immunity defense to each of the individual defendants. For example, we stated:

> The district court will be required to inquire into the status and responsibility of each individual defendant and to determine whether, for example, a trustee should be held responsible for the same level of knowledge of constitutional rights as a college president or a commissioner of education. The determination may turn on the relative availability to each defendant of counsel, as well as the relative certainty of the legal issue, a criterion to which the *Wood v. Strickland* Court expressly adverted.

538 F.2d at 62. In the concluding section of our opinion, summarizing the directions to the district court on remand, we included an instruction that "[t]he court should then make findings of fact with respect to the immunity of each defendant in conformance with this opinion." *Id.* 63.

Of course, if the district court was correct in its conclusion that Skehan was only seeking monetary damages from one of the individual defendants, then this Court's assumption to the contrary could not alter that fact.

On December 1, 1976, the district court issued an order reducing to writing certain agreements made between the parties at a pre-trial conference held that day. Within that order the court stated: "The parties stipulated at the final pre-trial conference that the Defendants Pittenger and Carlson are not liable to the Plaintiff for damages." Skehan has not presented any challenge to the accuracy of that statement, nor any reason why that stipulation should not be binding. Thus, there was no error in the district court's failure to consider the applicability of the official immunity defense to defendants Pittenger and Carlson.

Skehan did not name the individual members of the College's Board of Trustees as defendants in his complaint. In his description of the parties therein he identified the defendant Board of Trustees as "the official supervisory body of defendant, Bloomsburg State College." On December 1, 1976, Skehan filed a motion with the district court for leave to file an amendment to his complaint adding the names of the individual members of the Board to the list of parties defendant. The district court denied that motion in an order dated December 23, 1976, and Skehan challenges that order.

The district court held that Skehan's assumption that the individual trustees had already been made parties to this suit, and the fact that they had been made aware of its institution and progress to date, did not override the requirement that they be properly served as parties defendant under Rule 4 of the Federal Rules of Civil Procedure. In ruling on Skehan's motion, the court did not reach the question whether the requested amendment would be barred by the statute of limitations, or whether it might "relate back" to the date of the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure.

Rather, the sole basis of its decision denying Skehan's motion was that "justice requires that the amendment not be allowed at this stage of the proceedings," given that the trustees had not been previously informed that they were subject to individual liability, that portions of the case had already been decided on the merits and that trial on the remaining portions was about to commence.

Skehan contends that the district court abused its discretion in denying his motion to add the trustees as defendants. He argues that basic fairness required the court to grant his motion because he was not made aware that he would have to name the trustees as individuals in order to obtain back pay until this Court raised the issue of the College's possible sovereign immunity in its panel opinion entered on May 3, 1974. *See* 501 F.2d at 41-43.

Like a motion to reopen the record for the taking of additional testimony, *see* Part I,B *supra*, a Rule 15(a) motion for leave to amend the pleadings is within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although district courts are required to allow amendments freely under the terms of the Rule, certain factors, such as undue prejudice to the other party and undue delay by the movant, have been found to establish sufficient justification for the denial of such motions. *See* 3 *Moore's Federal Practice* ¶ 15.08[4] at 91-94 (2d ed. 1978). Here, the district court found that the trustees would be prejudiced by their addition as parties defendant in their individual capacities because they had not been participants in the proceedings that established Skehan's right to recovery on the pre-termination hearing claim. Moreover, Skehan's motion was filed until a short time prior to the scheduled date of trial on his remaining substantive claims. In light of the district court's careful consideration of these factors we cannot find the court's denial of Skehan's motion for

leave to add the individual members of the Board of Trustees as named defendants in his complaint to have been contrary to the sound exercise of its discretion.

Thus, the district court was correct in its assertion that Skehan had sought monetary damages from only one of the individual defendants properly served as a party to this action. The earlier assumption of this Court to the contrary cannot alter that fact, and, therefore, there was no error in the court's failure to consider the applicability of the official immunity defense to any defendant other than President Nossen.

This Court directed the district court to make findings concerning "whether the defendants met their burden of establishing (1) that they did not know and reasonably need not have known that depriving Skehan of a pre-termination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause him to suffer other injury." 538 F.2d at 62. Similar findings were to be made if the district court found for Skehan on his Article 5e claim. *Id.* 63. After hearing testimony on this issue the district court concluded that defendant Nossen had met his burden of proving both elements of the official immunity test, as set forth by the Supreme Court in *Wood v. Strickland*, 420 U.S. 308 (1975). The court fully set forth the factual findings it relied upon in reaching those conclusions.

Our review of the record does not support Skehan's contention that the district court's factual findings should be set aside as clearly erroneous. In reviewing those findings we must credit the district court's evaluation of the testimony, and that testimony clearly supports the court's findings that President Nossen did not act with malicious intent or in knowing violation of Skehan's constitutional rights in failing to provide him with either the procedures set forth in Article 5e or a hearing prior to his termination.

Additionally, we agree with the district court that at the time these events occurred in the Fall of 1970, defend-

ant Nossen did not have reason to know that his actions would later be held to have violated Skehan's constitutional rights. As the district court pointed out, quoting an opinion of the Seventh Circuit, "The first definitive holding that a termination of teachers' property interests in their employment contracts with state institutions required due process hearings was *Board of Regents of State Colleges v. Roth*, [408 U.S. 564 (1972)]." 431 F. Supp. at 1391, *quoting Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 578 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). The first definitive holding that Skehan was contractually entitled, under Pennsylvania law, to the provisions of Article 5e, and that the College's failure to afford him those procedures violated due process, was the district court's opinion in this case on the 5e issue. Paraphrasing the Supreme Court's opinion in *Wood v. Strickland, supra* at 321, we cannot say that President Nossen acted in "ignorance or disregard of settled, indisputable law" when he terminated Skehan's employment with the College without a prior hearing and without having acted upon his request for an Article 5e hearing.

We agree with the district court's findings and conclusions that defendant Nossen established by a preponderance of the evidence that he was entitled to an official immunity defense from Skehan's claims for monetary damages arising from either his dismissal from the College without a prior hearing or his failure to receive the academic freedom hearing set forth in Article 5e.[3]

D. *Injunctive Relief*

The district court issued a final order, unchallenged, and indeed supported, by the defendants, granting Skehan the following injunctive relief: he was reinstated to the

3. Because we have affirmed the determination that neither the College nor any of the individual defendants are liable to Skehan for a back pay award, we need not consider the defendants' argument that the earlier directions of this Court concerning the appropriate amount of such an award, *see* 538 F.2d at 63; Part III,A *supra*, must be reconsidered in light of the Supreme Court's intervening decision in *Carey v. Piphus*, 435 U.S. 247 (1978).

suspended with pay status he held at the College on October 15, 1970; the College was ordered to recreate for his case the procedures of Article 5e; a reconstituted Committee on Professional Affairs was to conduct the initial investigation of Skehan's allegation that his nonrenewal resulted from considerations violative of his academic freedom; deadlines were established for each stage of the nonrenewal proceedings set out in Article 5e and Article 9, *see* note 1 *supra;* and, following a final decision on Skehan's renewal or nonrenewal, the President of the College was given the option of holding a pretermination hearing within 30 days—failure to hold that hearing within the stated time would result in Skehan's full reinstatement as a faculty member of the College. 436 F. Supp. at 668-69.

Skehan contends that he should have been fully reinstated as a faculty member of the College pending the appropriate proceedings. In spite of his assertion to the contrary, nothing in this Court's prior opinions in this case required the district court to order Skehan fully reinstated to the position he held at the time prior to his suspension from teaching responsibilities. Rather, in our opinion en banc this Court directed that the district court should consider prospective reinstatement as a remedy for the College's violation of Skehan's right to the procedures set forth in Article 5e "at least until appropriate college termination procedures have taken place." 538 F.2d at 63. We did not instruct the district court that it had to award Skehan prospective reinstatement as a remedy for the 5e violation, nor did we define the terms of such reinstatement with particularity.

The district court determined that Skehan's reinstatement to the suspended with pay status he held prior to his termination from the College's employment on October 19, 1970, was a grant of equitable relief appropriate to this case. We believe that the court's order minimized the disruptive effects that would have resulted at the College had it required the administration to provide classes for Skehan

to teach pending the results of the mandated hearing proceedings. Additional disruption of scheduling would have occurred had the College altered its teaching assignments to accommodate Skehan's reinstatement only to determine some months later that its earlier decision to terminate Skehan's employment as a faculty member was to be reaffirmed.

On the other hand, the court's order enabled Skehan to return to the College's payroll pending the proceedings to which he was entitled and, thus, he was not "unduly limited in his ability to pursue the hearing remedy." 436 F. Supp. at 664. We believe that the relief afforded by the district court presented an equitable accommodation of the interests of both the College and Dr. Skehan. Noting the admonition of the Supreme Court that, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow," *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973), we hold that the district court's failure to order the College to provide Skehan with teaching responsibilities pending his Article 5e and pretermination hearings did not constitute an abuse of discretion.

Skehan has apprised this Court of proceedings that have taken place at the College subsequent to the district court's order reinstating him to a suspended status. He argues that this Court should fully reinstate him to his former position at Bloomsburg State because the College did not comply with that aspect of the district court's order mandating his full reinstatement if no pretermination hearing were held within 30 days of a final decision on the question of his renewal or nonrenewal. We believe that any questions concerning the College's compliance with the district court's final order of July 20, 1977, should be addressed to that court in the first instance. Thus, we shall deny the motion filed by Skehan in this Court for leave to file a supplemental appendix detailing events that have transpired at the College subsequent to the district court's order.

During the proceedings below Skehan based his claim for an award of attorney's fees on the provisions of the Civil Rights Attorney's Fees Awards Act of 1976,[4] which had been enacted subsequent to this Court's en banc opinion. The district court made factual findings, unchallenged here, that would preclude a fee award based on the alternative grounds of the defendants' bad faith either in the prelitigation stages of this case or in the pursuit of their defense. *See* 436 F. Supp. at 663. The court also denied Skehan's request for attorney's fees under the provisions of the Awards Act. Skehan's challenge to this aspect of the district court's order is governed by the opinion of the Supreme Court in *Hutto v. Finney*, — U.S. —, 98 S. Ct. 2565 (1978).

The district court's ruling denying Skehan's request for attorney's fees under the Awards Act from either defendant Nossen or from the College was multifaceted.

First, the court held that defendant Nossen was not personally liable for such an award because Skehan was not a "prevailing party" vis a vis Nossen. This followed from the fact that Nossen had established immunity to Skehan's claim for damages. 436 F. Supp. at 665. Even if Nossen's successful official immunity defense could not be viewed as preventing Skehan from characterizing himself as a prevailing party, the court held that it would have denied Skehan's request for fees from Nossen as an exercise of its discretion under the Act. The court stated that an award of fees against Nossen in his individual capacity would be grossly unjust, and would tend to "se-

4. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *amending* 42 U.S.C. § 1988, was enacted on October 19, 1976. It provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

verely undermine the policies which motivated the Supreme Court to fashion [the official immunity] defense." *Id.* 665-66.

The Supreme Court, in its opinion in *Hutto v. Finney*, stated that, absent a finding that individual defendants had litigated in bad faith, they would not be held liable to a fee award under the Awards Act. — U.S. at —, 98 S. Ct. at 2579. Thus, the district court's refusal to award fees to Skehan against defendant Nossen in his individual capacity could be affirmed on the basis of the court's factual finding that the defendants in this case had not pursued their defense in bad faith. Moreover, language in the *Hutto* opinion also suggests that the district court soundly exercised its discretion in refusing to award fees against a defendant who had been deemed immune from liability for damages under the official immunity doctrine. In a footnote disputing the dissenters' suggestion that the Awards Act should be construed to provide for fee awards only against individual defendants, the *Hutto* majority stated:

> This is manifestly unfair when, as here, the individual officers have no personal interest in the conduct of the State's litigation, and it defies this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to "exercise their discretion with undue timidity." *Wood v. Strickland*, 420 U.S. 308, 321 . . . .

Id. at —, n.32, 98 S. Ct. at 2578, n.32 (citation omitted).

The Supreme Court's opinion in *Hutto* is dispositive of Skehan's challenge to the district court's refusal to grant an award of attorney's fees against Nossen. That refusal must be viewed as a valid exercise of the court's discretion under the Act, given its previous determinations that Nossen was officially immune from damage liability and that he had not pursued his defense in bad faith.

The district court also held, however, that Skehan was not entitled to a fee award against the defendants in their official capacities. The Court stated that "[i]n the absence of explicit statutory language [in the Awards Act] subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment." 436 F. Supp. at 667. Thus, the court held that Skehan was constitutionally barred from recovery of a fee award against the College. The Supreme Court's opinion in *Hutto* requires us to reverse that holding.

In *Hutto* the Court held that under the Awards Act fees may be recovered from governmental entities otherwise entitled to immunity under the eleventh amendment. This holding was based on the Act's legislative history, clearly indicating Congress' intent to allow recovery of attorney's fees from the states or local governments, and on the fact that attorney's fees "as a part of the costs" have traditionally been awarded without regard for the states' sovereign immunity. — U.S. at — - —, 98 S. Ct. at 2575-79. The Court also made clear that the Awards Act applies to cases, such as this one, that were pending on the date of its enactment. *Id.* at —, n.23, 98 S. Ct. at 2576, n.23. *See generally Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 & n.14 (1974). Moreover, the Court held that whether or not state agencies are named as defendants in a § 1983 action, the Awards Act contemplates that the prevailing plaintiff may recover fees from the individual defendants in their official capacities or directly from the state agencies. — U.S. at —, 98 S. Ct. at 2578-79. Thus, the district court need not determine whether the College is a person subject to liability under § 1983 in order to grant Skehan's request for attorney's fees from the College. *See* Part III,B,2 *supra*.

The *Hutto* opinion necessitates that we remand this case to the district court for consideration of an award of attorney's fees to Skehan from the College under 42 U.S.C. § 1988. The district court suggested in its opinion on the

attorney's fees aspect of this case that even if the eleventh amendment did not bar a recovery of fees from the College, the court, in its discretion, would only have awarded fees to Skehan for time expended on the Article 5e claim. There is no need for us to rule on that suggestion at this time. Nonetheless, we refer the district court to the legislative history of the Awards Act, which offers some guidance as to Congress' intent with respect to the standards governing the discretion of district courts in making fee awards. The Senate Report accompanying the Act states:

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [§ 1988], if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912 (footnote omitted).

The computation of an appropriate fee award in this case should, of course, conform to the general standards formulated by this Court in prior opinions. *See Hughes v. Repko,* 578 F.2d 483 (3d Cir. 1978).

F. *Costs*

Skehan's final ground for appeal questions the district court's award of court costs. In its final opinion the district court stated that, "[b]ecause each party was at fault in this case, it seems appropriate that each party shall bear his own costs." 436 F. Supp. at 667. In its original opinion on the merits of this case, entered on May 9, 1973, the district court stated that "the Clerk will be directed to enter judgment in favor of the Plaintiff . . . together with costs." 358 F. Supp. at 436. We shall assume that

Skehan's entitlement to costs connected with the earlier proceedings in the district court, which were taxed against defendants on June 4, 1973, was not meant to be rescinded by the district court's order directing that each party bear his own costs with respect to the proceedings after remand. Given that assumption, we find no basis to alter the district court's determination as to costs.

IV. Conclusion

We shall deny defendants' motion to dismiss Skehan's appeal or, alternatively, to strike his brief and appendix and to require that they be refiled.

The judgment of the district court will be affirmed, except that the case will be remanded to the district court for consideration of an award of attorney's fees to plaintiff Skehan against the defendants in their official capacities, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.

Each party shall bear his own costs with respect to this appeal and cross-appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on September 29, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed March 24, 1977, May 18, 1977 and July 20, 1977, be, and the same are hereby affirmed, except that the cause is remanded to the said district court for consideration of an award of attorney's fees to plaintiff Skehan against the defendants in their official capacities, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, all in accordance with the opinion of this Court. Each party shall bear his own costs with respect to this appeal and cross-appeal.

ATTEST:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

December 21, 1978

Order Enlarging Time to File Petition for Rehearing

Present: SEITZ, *Chief Judge*

1. Motion by appellant-cross-appellee, Joseph T. Skehan, for an extension of time to file petition for rehearing from its present due date of January 4, 1979, to and including January 29, 1979, in the above-entitled cases. The opinion was filed and the judgment entered on December 21, 1978.

Respectfully,

T. F. QUINN/ags,
Clerk.

ags
enc.
P.S.-If any answer, due by January 15, 1979, is received it will be forwarded immediately to you.

The foregoing Motion is granted.

By the Court,

SEITZ,
Chief Judge.

Dated: January 9, 1979

Order Staying the Mandate

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until March 23, 1979.

SEITZ,
Chief Judge.

Dated: February 23, 1979

Order Further Staying the Mandate

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until May 15, 1979.

SEITZ,
Chief Judge.

Dated: April 6, 1979

***Sur* Petition for Rehearing—Third Circuit Court of Appeals**

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 77-2311 and 77-2312

DR. JOSEPH T. SKEHAN,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

DR. JOSEPH T. SKEHAN,
Appellant in No. 77-2311,

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*, ETC.,
Appellants in No. 77-2312.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges* and LACEY, *District Judge.*

The petition for rehearing filed by Plaintiff-Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

(ILLEGIBLE) SEITZ,
Chief Judge.

Dated: February 14, 1979.

Deny Stay Order Dated November 30, 1977—
Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
For The Third Circuit

Nos. 77-2311/12

DR. JOSEPH T. SKEHAN,
Appellant, No. 77-2311,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE and DR. ROBERT NOSSEN and DR. CHARLES CARLSON and JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania and BLOOMSBURG STATE COLLEGE,
Appellants, No. 77-2312.

(D.C. Civil No. 72-644)

November 21, 1977

Present: ROSENN and VAN DUSEN, *Circuit Judges.*

1. Motion by Dr. Joseph T. Skehan, appellant in No. 77-2311, to reconsider this Court's order dated November 4, 1977, which order denied appellant's motion for stay of part of the order of the District Court of July 20, 1977.

2. Appellees' letter-answer, dated November 15, 1977, to appellant's motion,

3. Copy of this Court's order dated November 4, 1977 sent by the undersigned for the Court's information,

in the above-entitled cases.

Respectfully,

(ILLEGIBLE) QUINN fm,
Clerk.

enc.
FM:jg

The foregoing Motion is/are denied

By the Court,

(ILLEGIBLE) ROSENN,
Judge.

Dated: November 30, 1977

**Deny Stay Order Dated November 4, 1977—
Third Circuit Court of Appeals**

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 77-2311-12

DR. JOSEPH T. SKEHAN,
Appellant, No. 77-2311,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE and DR. ROBERT NOSSEN and DR. CHARLES CARLSON and JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania and BLOOMSBURG STATE COLLEGE,
Appellants, No. 77-2312.

(D. C. Civil No. 72-644).

October 21, 1977

Present: ROSENN and VAN DUSEN, *Circuit Judges.*

1. Motion by Dr. Joseph T. Skehan, appellant in No. 77-2311, to stay part of District Court order of July 20, 1977, pending final determination of all motions and appeals challenging it,

2. Appellees' brief in opposition to the above motion filed Oct. 31st, 1977

in the above-entitled cases.

Respectfully,

(ILLEGIBLE) QUINN fm,
Clerk.

enc.
fm

The foregoing Motion is/are denied.

By the Court,
(ILLEGIBLE) ROSENN,
Judge.

Dated: November 4, 1977

Deny Stay Order Dated December 8, 1977—
Third Circuit Court of Appeals

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
(Complaint Filed 12/22/72)
(Judge Muir)

ORDER

December 8, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 20, 1977, this Court entered an Order directing that Skehan be reinstated to the suspense status he held as a faculty member at Bloomsburg State College on October 15, 1970 and that certain administrative procedures be afforded him. The purpose of this action was to remedy certain violations of due process which had occurred in the termination of Skehan as a professor at Bloomsburg State College in 1970 and a decision not to renew his contract of

employment at Bloomsburg State College beyond the 1970-71 academic year. On October 11, 1970, Skehan submitted to the Court a motion for a rule to show cause why part of the Order of July 20, 1977 should not be stayed pending final determination of all motions and appeals challenging it. On October 31, 1977, this Court denied that motion because it found that Skehan had not met the standards required for a stay of an order.

By Order dated November 4, 1977, the United States Court of Appeals for the Third Circuit similarly denied Skehan's motion for a stay pending appeal. On or about November 15, 1977, Skehan filed a second motion for a stay pending appeal with the United States Court of Appeals for the Third Circuit. The United States Court of Appeals has denied this second motion for a stay pending appeal. On November 22, 1977 Skehan filed a motion in this Court to reconsider the Court's Order denying his motion to stay the proceedings ordered by this Court on July 20, 1977. On November 29, 1977, Defendants filed a brief in opposition to Skehan's Motion.

When Skehan filed his motion for reconsideration this Court lacked jurisdiction to consider it because Skehan filed a motion for a stay with the United States Court of Appeals. If this Court had jurisdiction to decide Skehan's motion it would affirm its Order of October 31, 1977. The grounds set forth in Skehan's motion and the affidavits accompanying it do not cause this Court in any way to change its view that Skehan has failed to meet the standards required for a stay to issue. Determining whether a stay should be granted, the moving party must show the following:

Deny Stay Order Dated December 8, 1977—
Third Circuit Court of Appeals.

(1) that his success on the merits of the appeal is likely,

(2) that unless the stay is granted he will suffer irreparable harm,

(3) that no substantial harm will come to other interested parties and

(4) that the granting of a stay will do no harm to the public interest.

Belcher vs. Birmingham Trust National Bank, 395 F.2d 685, 686 (5th Cir. 1968); Long vs. Robinson, 432 F.2d 977, 979 (4th Cir. 1970); 7 Moore's Federal Practice, ¶62.05, page 62-24, 2d Edition, 1974. For the reasons stated in the background to its Order of October 31, 1977, this Court finds that Skehan has not shown that he will suffer irreparable harm if the stay is not granted and that the Defendants have shown that substantial harm will result to them if the stay is granted and that the granting of the stay will do harm to the public interest.

In the light of the foregoing, the Court will affirm its Order denying Skehan's motion for a stay of this Court's Order of July 20, 1977.

NOW, THEREFORE, IT IS ORDERED THAT:

Skehan's motion to reconsider the Court's Order of October 31, 1977 is denied.

MUIR,
U.S. District Judge.

8/2/77 - Order - Deny New Trial w/o Prejudice

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

August 2, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 2, 1977; the Plaintiff himself filed a motion for a new trial and an affidavit and documents in support thereof. The Plaintiff is represented in this case by able counsel, Bruce J. Terris, Suellen T. Keiner, and Eleanor M. Granger, of Washington, and Louise O. Knight of Lewisburg. It is the practice of this Court not to accept motions prepared and filed by litigants who are represented by counsel. In cases where there are counsel of record, all motions must be signed by counsel. Therefore, the motion and affidavit and documents in support thereof will be denied without

8/2/77—Order—Deny New Trial w/o Prejudice.

prejudice. There may well be some doubt as to whether the motion has been timely filed in accordance with F.R.Civ.P. 5(9). The Court is not ruling at this time on whether the motion has been timely filed.

NOW, THEREFORE, IT IS ORDERED THAT:

The motion of Plaintiff for new trial filed August 2, 1977 be and the same is hereby denied without prejudice.

MUIR,
U.S. District Judge.

8/10/77—Order Deny *Pro Se*

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

August 10, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 2, 1977, Skehan himself filed a motion for a new trial and an affidavit and documents in support thereof. Because Skehan is represented in this case by able counsel, Bruce J. Terris, Suellen T. Keiner, and Eleanor M. Granger of Washington, and Louise O. Knight of Lewisburg, the Court would not accept motions prepared by Skehan and denied his motion for new trial without prejudice by Order of August 2, 1977. On August 8, 1977, Skehan filed with the Court a petition to plead and conduct his own case during post-trial and appellate proceedings. His counsel have submitted no motion to the Court to withdraw from this case. According to

8/10/77—Order Deny Pro Se.

Skehan, his counsel have told him that they will only act on his behalf on matters concerning attorney's fees. The Court will not allow a situation to develop where Skehan is represented by counsel on one issue and represents himself on the remaining issues. This will lead to confusion and frustrate any expeditious resolution of this case. Until such time as his counsel files a motion to withdraw from this case, the Court will require that all motions submitted by Skehan be signed by his counsel. Skehan's petition to plead and conduct his own case during the post-trial and appellate proceedings will be denied.

NOW, THEREFORE, IT IS ORDERED THAT:

Skehan's petition to plead and conduct his own case during the post-trial and appellate proceedings is denied.

MUIR,
U.S. District Judge.

8/22/77—Order/Deny Withdrawal

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

August 22, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 18, 1977, Bruce J. Terris, Suellen T. Keiner, Eleanor M. Granger, and Louise O. Knight filed a motion to withdraw as counsel for Plaintiff "in present proceedings before this Court." At the conclusion of the motion, counsel requested that the "Court grant their motion for leave to withdraw". The Court cannot tell whether this is a motion for a general withdrawal of appearance or a limited withdrawal. This Court does not permit withdrawal of counsel for one purpose and not for another. There is also no indication that a copy of the motion to withdraw as counsel has been forwarded to the Plaintiff.

8/22/77—Order/Deny Withdrawal.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The motion of Bruce J. Terris, Suellen T. Keiner, Eleanor M. Granger, and Louise O. Knight to withdraw as counsel "in present proceedings before this Court" filed August 18, 1977 be and the same is hereby denied without prejudice.

2. The Clerk shall send a copy of this Order to counsel and to Plaintiff.

MUIR,
U.S. District Judge.

8/22/77—Order No. 2 Deny New Trial/*Pro Se*

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER NO. 2

August 22, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 19, 1977, shortly before 5:00 P.M. the Plaintiff filed in Lewisburg his motion to reinstate Plaintiff's motion for new trial and to plead and conduct his own case. He refers therein to advice received by him from his attorneys that they had filed their praecipe to withdraw. The motion for withdrawal was ambiguous and has been denied by this Court. Since Plaintiff is still represented of record by able counsel, such counsel must execute all motions. The Plaintiff also on August 19, 1977 filed a copy of his motion to extend time addressed to the Court of Appeals, a notice of appeal, and a letter to the undersigned judge stating in part "It sets forth the

data permitting, it would appear, two interpretations: that no 'final judgment' be present; that 'final judgment' be present. "Thank you for your views on this matter." This Court does not give any litigant any advisory views on any matter.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Plaintiff's motion filed August 19, 1977 to reinstate Plaintiff's motion for new trial and to plead and conduct his own case is denied without prejudice.

2. The Plaintiff's request dated August 19, 1977 for the views of the undersigned judge is rejected.

MUIR,
U.S. District Judge.

8/31/77—Order—Grant Withdrawal

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

August 31, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 30, 1977, counsel for Skehan, Bruce J. Terris, Suellen T. Keiner, Eleanor M. Granger, and Louise O. Knight, filed with the Court a motion to withdraw as counsel for Skehan in this case. The motion is for a total withdrawal as counsel. Counsel also submitted a brief in support of the motion, According to the brief, the reason for the withdrawal is a breakdown of confidence and communication between counsel and Plaintiff. Skehan has requested that counsel withdraw from the entire case. The Court will grant the motion for withdrawal.

8/31/77—Order—Grant Withdrawal.

NOW, THEREFORE, IT IS ORDERED THAT:

The motion of Skehan's counsel to withdraw as counsel from the above-captioned case is granted.

MUIR,
U.S. District Judge.

9/12/77—Order Grant *Pro Se*

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

JOSEPH T. SKEHAN,

Plaintiff,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
(Judge Muir)

ORDER

September 12, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 2, 1977 Skehan filed *pro se* a motion for a new trial. On August 6, 1977 Skehan filed *pro se* a motion to plead and conduct his own case. On August 2 and August 10, 1977 the Court denied those motions without prejudice because Skehan had counsel and they had not signed them. Skehan's counsel had been given, at their motion, leave to withdraw from representing Skehan in this case.

On September 1, 1977 Skehan filed with the Court a motion to reinstate his motions for new trial and to plead and conduct his own case. Reinstatement is not the proper procedure and this Court will in the future deny motions for reinstate-

ment unless unusual circumstances are present. Skehan should have filed a new motion for a new trial and a new motion to plead and conduct his own case. Because Skehan is not a lawyer the Court will not require him to submit new motions. Skehan will be permitted to represent himself because his counsel has withdrawn. The Court will not wait for a responsive brief because Skehan at this point in the proceedings has a statutory right to represent himself. 28 U.S.C. § 1653

NOW, THEREFORE, IT IS ORDERED THAT:

Skehan's motion to plead and conduct his own case is granted.

MUIR,
United States District Judge.

9/22/77—Order—Deny New Trial

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

September 22, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 2, 1977, Skehan filed with this Court a motion for a new trial. On that same day, the Court denied his motion for new trial without prejudice because his counsel of record had not signed it. On August 18, 1977, Skehan's counsel filed with the Court a motion to withdraw from this case. On August 22, 1977, the Court denied his motion without prejudice. On August 19, 1977, Skehan moved to reinstate the motion for a new trial. On the same day, Skehan filed a notice of appeal to this Court's Orders of August 30, 1976, October 22, 1976, November 10, 1976, November 16, 1976, December 22, 1976, December 23, 1976, January 10, 1977, March 24,

1977, May 18, 1977, and July 20, 1977. On August 22, 1977, the Court denied Skehan's motion to reinstate his motion for a new trial and denied his counsel's motion to withdraw. On August 30, 1977, Skehan's counsel submitted a second motion to withdraw. On September 1, 1977, this Court granted that motion. On that same day, Skehan filed a second motion to reinstate his motion for a new trial. On September 8, 1977, Skehan submitted a brief in support of that motion. On that same day, the Defendants filed a brief in opposition to that motion.

The Court is of the view that when Skehan filed a notice of appeal from this Court's various orders to the United States Court of Appeals for the Third Circuit on August 19, 1977, this Court lost jurisdiction to rule upon Skehan's motion for reinstatement of his motion for a new trial filed on September 1, 1977. Filing a notice of appeal generally immediately transfers jurisdiction of the case from the District Court to the Court of Appeals. Hovey vs. McDonald, 109 U.S. 150 (1883); Plant Economy, Inc. vs. Mirror Insulation Company, 308 F.2d 275, 276-277 (3d Cir. 1962); United States vs. Lafko, 520 F.2d 622, 627 (3d Cir. 1975). An Appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case. United States vs. City of Chicago, 534 F.2d 708 (7th Cir. 1976). But Skehan has in addition to appealing from the various interlocutory orders appealed from the final order in the case. No issues remain to be decided by this Court. If Skehan's motion for a new trial had been filed before August 19 and had not been acted upon by the Court before August 19, then the notice of appeal would not have divested this Court of jurisdiction, because the motion for a new trial would have prevented the judgment of the Court from being final, Sykes

vs. United States, 392 F.2d 735, fn. 1, 738 (8th Cir. 1968). But the Court had already denied Skehan's motion for a new trial before notice of appeal was filed. Skehan's motion to reinstate his motion for a new trial filed on August 19, 1977 did not prevent the notice of appeal from depriving this Court of jurisdiction because a motion for reinstatement does not prevent a judgment from becoming final. Because this Court has no jurisdiction over Skehan's motion to reinstate his motion for a new trial, that motion will be denied.

NOW, THEREFORE, IT IS ORDERED THAT:

Skehan's motion to reinstate his motion for a new trial is denied.

MUIR,
U.S. District Judge.

Opinion—July 20, 1977

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

APPEARANCES:

For Plaintiff—Bruce J. Terris, Esq., Suellen T. Keiner, Esq., Eleanor M. Granger, Esq., Terris, Needham, Keiner, Black & Hostetler, 1526 18th St., N.W., Washington, D.C. 20036.

Louise O. Knight, Esq., Clement & Knight, 118 Market St., Lewisburg, Pa. 17837.

For Defendants—Howard M. Levinson, Esq., J. Justin Blewitt, Jr., Esq., Dept. of Justice, State Capitol, Harrisburg, Pa. 17120.

OPINION

MUIR, District Judge.

I. Introduction.

Skehan, formerly an Associate Professor at Bloomsburg State College, has brought this action alleging that the Defendants violated his constitutional rights by terminating his employment as a professor at the College in October, 1970 and by failing to renew his contract for the 1971-1972 academic year. The history of this case is set forth in this Court's Opinion of May 18, 1977, ... F.Supp. ..... In 1973, this Court found that Skehan's constitutional rights pursuant to the Fourteenth Amendment were violated by his termination as a member of the faculty without a prior hearing. 358 F.Supp. 430 (M.D. Pa. 1973). In its opinion of May 18, 1977, this Court concluded that the decision not to renew Skehan's contract for the academic year 1971-1972 without affording him the procedures prescribed by Article 5e[1] of the Statement of Policy of Bloomsburg State College violated the due process clause of the Fourteenth Amendment. The Court also stated in its opinion that the only Defendant from whom Skehan sought monetary damages had acted in good faith and in a reasonable manner and therefore was protected by the doctrine of official immunity as set forth in Wood vs. Strickland, 420 U.S. 309 (1975). The only issues remaining in this litigation are whether Skehan is entitled to any equitable relief as the result of the two violations of his constitutional rights, whether his attorneys should be awarded part or all of the $87,288.50 claimed as attorney's fees and whether Skehan should recover expenses and costs from the Defendants. The

[1] 5e conforms to the numbering system in the Statement of Policy. The Article is referred to as 5(e) in the Circuit Court opinion.

following are the Court's findings of fact, its discussion of these issues, and its conclusions of law concerning these matters.

II. Findings of Fact.

1. On October 10, 1972, Plaintiff filed a complaint against the Defendants with a claim that they had violated his constitutional rights by their failure to provide him a hearing prior to his termination on October 17, 1970.

2. One of the statutes under which Plaintiff brought suit was 42 U.S.C. § 1983 (Undisputed).

3. Plaintiff prevailed in this Court in 1973 on his claim that Defendants violated his due process rights by their failure to provide him a hearing prior to his termination (Undisputed).

4. Plaintiff was represented in these initial proceedings in this Court by Harry Lore (Undisputed).

5. Plaintiff appealed the decision of this Court of May 9, 1973 to the United States Court of Appeals for the Third Circuit (Undisputed).

6. Plaintiff prevailed in the Court of Appeals in that the case was remanded to this Court for findings as to whether Defendants had violated his First Amendment and due process rights in the course of their decision not to renew his contract and in that the Court of Appeals upheld this Court's ruling that Plaintiff's due process rights had been violated by Defendants' failure to provide him with a hearing prior to termination.

7. The Court of Appeals also determined that Defendants were immune from liability to Plaintiff in damages because they were engaged in discretionary functions (Undisputed).

8. Plaintiff was represented in the proceedings in the Court of Appeals in 1973-1974 by Michael H. Gottesman who was assisted by his associate, Dennis D. Clark.

9. Plaintiff filed a petition for a writ of certiorari in 1974 on the issues of sovereign immunity, official immunity and attorneys' fees (Undisputed).

10. The Supreme Court, which granted Plaintiff's petition for a writ of certiorari, vacated the judgment of the Court of Appeals and remanded for further consideration on the issues of official immunity and attorney's fees.

11. Plaintiff was represented in the proceedings in the Supreme Court in 1974 and 1975 by Bruce J. Terris.

12. Plaintiff prevailed in the Court of Appeals in 1976 in that the Court of Appeals ruled that Plaintiff was entitled to an award of damages if the individual defendants did not meet their burden of proof on official immunity and that Plaintiff was entitled to an award of attorney's fees if Defendants had litigated in bad faith.

13. Michael H. Gottesman and Dennis D. Clark represented Plaintiff in 1975-1976 in the proceedings on remand to the Court of Appeals from the Supreme Court (Undisputed).

14. Plaintiff prevailed in the proceedings in this Court on remand in 1976 and 1977 in that this Court has determined that Defendants violated Plaintiff's due process rights by failing in the course of their decision not to renew his contract beyond the 1970-1971 academic year to provide him with the procedures to which his contract entitled him.

15. Robert B. Elion and Robert B. Wayne represented Plaintiff initially in proceedings in this Court in 1976 on remand from the Court of Appeals (Undisputed).

16. After Plaintiff's case was remanded to this Court in 1976, Defendants filed a petition for a writ of certiorari to the Supreme Court on the questions whether the Court of Appeals had ruled correctly on the issues of the sovereign immunity, official immunity and attorney's fees (Undisputed).

17. Defendants' petition for a writ of certiorari was denied by the Supreme Court on November 29, 1976.

18. Dennis D. Clark represented plaintiff-respondent before the Supreme Court in response to Defendants' petition for a writ of certiorari (Undisputed).

19. Bruce J. Terris represented Plaintiff during proceedings in this Court after the withdrawal of Robert B. Elion and Robert B. Wayne as counsel for Plaintiff; associates of Mr. Terris who assisted him during these proceedings were Eleanor M. Granger, Zona F. Hostetler, Nathalie V. Black, Lonnie C. Von Renner, Edward C. Comer and Suellen T. Keiner (Undisputed).

20. Mr. Terris undertook representation of Plaintiff before this Court in 1976 because passage of the Civil Rights Attorney's Fees Awards Act was imminent and Plaintiff's right to recover attorney's fees under the Act was contingent on Plaintiff prevailing (Undisputed).

21. Plaintiff claims to have incurred legal expenses, other than the fees and expenses of his attorneys, including the cost of travel to and from conferences with his attorneys and the cost of telephone calls to his attorneys in order to assist them in his case.

22. Plaintiff has submitted an application for an Award of Costs and Attorney's Fees to this Court (Undisputed).

23. Plaintiff's application was prepared by Bruce J. Terris and his associates Eleanor M. Granger and Peter J. Eglick (Undisputed).

24. Prior to May 1, 1977, Mr. Terris and his associates conferred with and assembled materials from all of the attorneys who have represented Plaintiff from the time the complaint was filed up to the conclusion of the proceedings in this Court; after May 1, 1977, they prepared the application, researched and prepared a trial brief on the award of attorney's fees, prepared findings of fact and conclusions of law, attended a pre-pretrial conference, and represented Plaintiff at the hearing on the application (Undisputed).

25. At the present time there is no Committee on Professional Affairs at Bloomsburg State College (BSC).

26. The Statement of Policy of Continuous Employment and Academic Freedom at Bloomsburg State College has been superseded by a collective bargaining agreement between the Association of Pennsylvania State College and University Faculties and the Commonwealth of Pennsylvania.

27. The collective bargaining agreement mentioned in the preceding paragraph went into effect on September 1, 1974, and is in effect at the present time.

28. Defendants were the prevailing party with respect to the venue issue raised in the United States District Court for the Eastern District of Pennsylvania, where this case was originally brought (Undisputed).

29. Defendants were the prevailing party at the preliminary injunction stage of this case (Undisputed).

30. This Court has found that Plaintiff was not discharged from his employment at BSC in October of 1970 for reasons violative of the First Amendment. Thus, as to this First Amendment issue, the Defendants are the prevailing parties (Undisputed).

31. This Court has found that Plaintiff was discharged because of his refusal to follow administrative directives and specific orders from his superiors relating to the scheduling and teaching of classes in the fall of 1970.

32. Plaintiff-Appellant designated the following issues for review by the Court of Appeals:

> 1) "Having found that plaintiff was wrongfully discharged in mid-term without a proper prior hearing under the Due Process Clause of the Fourteenth Amendment should not the lower Court, having found a contract of employment, awarded plaintiff his salary for the remainder of the academic year, as well as damages for lost salary in the ensuing years, counsel fees and reinstatement?"
>
> 2) "Was the suspension and subsequent discharge a nullity, in view of the failure to provide a due process hearing before the body mandated in the college's 'Statement of Policy?' "
>
> 3) "Was the plaintiff's dismissal as a college professor grounded upon constitutionally impermissible reasons under the First and Fourteenth Amendments?"
>
> 4) "Did the lower Court err in finding that plaintiff disobeyed an administrative directive on class scheduling?"
>
> 5) "Is the failure to provide a due process hearing prior to discharge where such is clearly required by the Fourteenth Amendment of the U.S. Constitution as well as the College's regulations, a mere 'technical deprivation' warranting damages in the nominal amount of one dollar?"
>
> 6) "Whether the lower Court erred in failing to take judicial notice of the censure report on Bloomsburg by the AAUP and of its own dockets in connection with the suit brought by Professor Maxwell Primack against defendants in connection with his discharge in violation of the First and Fourteenth Amendments?" (Undisputed).

33. Plaintiff-Appellant did not raise in this Court prior to 1976 or in the Court of Appeals the issue as to whether the decision not to renew Plaintiff after the 1970-1971 academic year was in violation of the First Amendment.

34. Plaintiff-Appellant did not raise in the district court in 1972 or in the Court of Appeals the issue of whether his constitutional rights had been violated by not being afforded the procedures of 5e of the Statement of Policy of Bloomsburg State College.

35. Article 5e provides, in part, that, "[i]f a faculty member of professional (sic) rank, on probationary appointment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegation shall be given preliminary consideration by the Committee on Professional Affairs . . ." (Undisputed).

36. Plaintiff did not show by a preponderance of the evidence that his stands concerning campus issues at Bloomsburg State College were a substantial factor in the nonrenewal of his contract by either the then President of the college, Nossen, or the Board of Trustees.

37. Assuming arguendo that Plaintiff had shown by a preponderance of the evidence that his protected speech was a substantial factor in the decision not to renew his employment

contract, Defendants Nossen and the Board of Trustees have established by a preponderance of the evidence that they would have reached the same decision as to his reemployment even in the absence of the protected conduct.

38. This Court has found that Defendant Nossen acted in good faith in not affording Plaintiff the procedures set forth under Article 5e of the Statement of Policy. Thus, as to this issue of official immunity, defendants are the prevailing party (Undisputed).

39. This Court has found that Nossen acted in good faith and in a reasonable manner in not affording Plaintiff a due process hearing prior to Plaintiff's termination on October 19, 1970. Thus, as to this issue of official immunity, defendants are the prevailing party (Undisputed).

40. In its second opinion in this case, the Third Circuit held as follows: "It can hardly be said that on those issues on which the Defendants have thus far prevailed the defense has been maintained in bad faith, vexatiously, wantonly, or for oppressive reasons. Nor can we find evidence of oppressiveness in Defendants' response on appeal to those issues on which Skehan has been successful." (Undisputed).

41. Since this case was remanded by the Third Circuit in June of 1976, Plaintiff has filed with this Court three requests for the production of documents and one set of interrogatories (Undisputed).

42. Each of the discovery requests identified in the preceding paragraph was accompanied by a motion to reduce time and a brief in support thereof (Undisputed).

43. This Court denied all of Plaintiff's motions to reduce time in connection with discovery requests (Undisputed).

44. As to each of the four discovery requests referred to in ¶ 41 above, Plaintiff filed a motion to compel discovery under Rule 37 (Undisputed).

45. This Court denied all four of the Rule 37 Motions filed by Plaintiff (Undisputed).

46. In connection with one of the Rule 37 motions, this Court, in an opinion filed on November 16, 1976, held as follows:

> "Except for *pro se* civil rights actions by state prisoners, the Court has not witnessed a more flagrant misuse of the discovery procedures provided by the Federal Rules of Civil Procedure. Discovery, when properly employed, is a worthwhile device for the preparation and fair disposition of cases. However, its continued vitality as a legitimate instrument of legal inquiry is threatened by misuse. The technique of litigation by exhaustion through discovery makes a mockery of the process. If discovery in all cases were conducted as in this particular request, the legal system would collapse under its own weight." (Undisputed).

47. The individual defendants did not act vexatiously or oppressively in the pre-litigation stages of this case.

48. The defense of this case has not been pursued in bad faith, or vexatiously, wantonly or oppressively.

49. Plaintiff was a probationary employee with the Department of Economics during his employment at Bloomsburg State College (Undisputed).

50. The Article 5(e) issue was not raised in either of the Supreme Court proceedings in this case (Undisputed).

51. Defendants' motion for Leave to File an Amended Answer Raising the Defense of the Statute of Limitations was granted (Undisputed).

52. Defendants' Motion to Take Additional Testimony on the Issue of Official Immunity was granted (Undisputed).

53. Plaintiff's Motion to Take Additional Testimony on His First Amendment Claim was denied (Undisputed).

III. Discussion.

Skehan contends that he is entitled to reinstatement as a remedy for the Defendants' violation of his constitutional right to a pretermination hearing. Two competing factors must be considered by the Court in fashioning a remedy in this case. One is that if Skehan's constitutional rights are to be protected, adequate remedies should be afforded him. The other factor is that Skehan bears an extremely large measure of responsibility for the violation of his constitutional right to a pretermination hearing. The Court has set this forth in its findings of fact of May 18, 1977. Skehan's conduct in refusing to teach his classes at assigned times created confusion among his students and caused disrespect for the college administration. The administration repeatedly warned Skehan that action would be taken against him if he did not meet his classes at the assigned times. In spite of these warnings, Skehan refused to comply with the directions of his superiors. As a result, he was suspended on October 9, 1970. Even after suspension, Skehan continued to meet with classes, informing students that they would receive credit for attending courses taught by him despite the fact that the administration advised Skehan's students that they should not attend courses taught by him, and that they would not receive credit for such attendance. As a result of his conduct, Skehan was terminated on October 19, 1970, effective October 17, 1970. The termination brought no peace to the college. Skehan continued to attempt to hold classes. Finally, the college administration

applied to the Court of Common Pleas of Columbia County to enjoin Skehan from further disrupting the campus. A consent decree was ultimately entered. To reinstate Skehan with full teaching duties after his blatant disregard for administrative directives would seriously undermine respect for the college administration at Bloomsburg State College, would have the potential of impairing the college's ability to operate its own affairs and would result in a grave miscarriage of justice.

Federal court interference with the administrative procedures of state institutions should be kept to a minimum. Rizzo vs. Goode, 423 U.S. 326 (1976). Prospective reinstatement is an equitable remedy. The requirements of the law of equitable remedies clearly applies to § 1983. Gurmankin vs. Costanzo, ... F.2d .... (3d Cir. 4/25/76). Equity has traditionally only offered its relief to those who have clean hands. Precision Instrument Manufacturing Company vs. Automotive Maintenance Machinery Company, 324 U.S. 806 (1945). Consequently, the clean hands doctrine should in my view be considered when equitable relief is sought pursuant to 42 U.S.C. § 1983. Brown vs. Greer, 296 F.Supp. 595 (S.D. Miss. 1969). The clean hands doctrine bars Skehan from full reinstatement as a faculty member.

The appropriate remedy in this case is reinstatement of Skehan to the suspended status that he held on October 15, 1970. Because Skehan has not contended that his suspension was invalid, reinstatement of Skehan to the position that he held before the unconstitutional termination is sufficient. Horton vs. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972). The Court would have reached this conclusion even if Skehan had acted with clean hands. His conduct only reinforces the Court's view that reinstatement to the status he held on October 15, 1970 is the appropriate remedy.

Skehan has not claimed that his suspension violated the United States Constitution. No reason exists to place him in a position superior to that which he possessed when the illegal conduct of the Defendants commenced. Skehan's reinstatement to a suspended status may be ended either by his full reinstatement or a termination. The College will be required to afford him a hearing comporting with due process at which he will have an opportunity to refute any charges relating to his conduct in 1970.

Reinstating Skehan to the status that he held on October 15, 1970 alleviates the disadvantages which, according to the Court of Appeals for the Third Circuit, occur when a public employee is terminated prior to a hearing. Skehan vs. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974). Skehan will be on the payroll and will not be unduly limited in his ability to pursue the hearing remedy. The concern of the Court of Appeals that after an employee is terminated an institution will make substitute teaching arrangements, thus increasing whatever tendency may already exist for the hearing officials to defer to the administration's decision is not present in this case. Any substitute teaching arrangements have already been made and will not be altered by a full reinstatement of Skehan.

Skehan also maintains that the proper remedy for the failure of Bloomsburg State College to provide him with the administrative procedures of 5e of the Statement of Policy is his reinstatement. Because Skehan has not contended in any proceedings before this Court, or the United States Court of Appeals or the United States Supreme Court that his suspension with pay on October 9, 1970 was illegal, the Court concludes that he should be placed back in the position he held after his suspension and before his termination. In addition,

reinstating Skehan to his full status as a faculty member because of the Bloomsburg College's officials' failure to afford him the appropriate procedures before deciding not to renew his employment would also vitiate this Court's determination to limit Skehan's equitable remedies because of his violation of the clean hands doctrine. Full reinstatement is not the required remedy for failure to provide due process prior to a final determination of the renewal of an employment contract. In Perry vs. Sindermann, 408 U.S. 593, 603 (1972), the Supreme Court concluded that proof of an individual's property interest in continued public employment did not entitle him to reinstatement.

Because the procedures under 5e of the Statement of Policy are no longer in effect at Bloomsburg State College, the Defendants must recreate them for Skehan. He is entitled to those procedures, no more, no less. Establishing special hearing boards as suggested by the Defendants could result in Skehan not being afforded protection equivalent to that provided by 5e. The Court will order that Bloomsburg State College and the other relevant Defendants afford Skehan the first tier of applicable procedures of Article 5e within 90 days. A decision by the Committee on Professional Affairs should be rendered within 30 days of the date on which it completes its proceedings concerning Skehan.

Skehan contends that the Court of Appeals was in error when it ruled that the state Defendants, acting in their official capacities, were protected from an award of damages by sovereign immunity. This Court is bound by the decision of the United States Court of Appeals and therefore will reject this argument.

Next, Skehan seeks $87288.50 in attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559 enacted October 19, 1976,[2] from the Defendant Nossen in his individual capacity and from Nossen and the other Defendants in their official capacities as state officials. In order to be entitled to attorney's fees from Nossen in his individual capacity, Skehan must establish that he was the prevailing party in this litigation. Although Skehan did prove by a preponderance of the evidence that Nossen violated his Fourteenth Amendment rights by failing to accord him a hearing prior to termination and by failing to provide him with the procedures contained in 5e of the Statement of Policy of Bloomsburg State College, Nossen showed by a preponderance of the evidence that he had committed these violations without malicious intent to deprive Skehan of his constitutional rights or injure him in any other way and that

[2] 42 U.S.C.A. § 1988 (1976)

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

his actions were reasonable. Because Nossen prevailed on the issues of good faith and the reasonableness of his failure to provide Skehan with a prior termination hearing and the procedures of 5e, Nossen is immune to a damage action by Skehan. Consequently, as to Skehan's claim for damages, Nossen is the prevailing party and is not liable in his personal capacity for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.

Even if Skehan were to be viewed as having prevailed against Nossen, this Court would not direct Nossen to pay Skehan's attorney's fees in his individual capacity. The Civil Rights Attorney's Fees Awards Act of 1976 permits the Court to exercise its discretion as to whether to award attorney's fees. Awarding attorney's fees against Nossen in his individual capacity would be grossly unjust. Nossen acted in good faith and in a reasonable manner when he failed to accord Skehan his constitutional rights. To penalize Nossen for conduct which was neither malicious nor negligent would violate the standards of common decency. In addition, awarding attorney's fees against Nossen personally after he has prevailed on the official immunity issue would severely undermine the policies which motivated the Supreme Court to fashion this defense. Unlimited personal liability of public officials for attorney's fees pursuant to 42 U.S.C. § 1983 would inhibit public officials from performing their duties in an efficient and prompt manner. Sheuer vs. Rhodes, 416 U.S. 232, 242 (1973). The amount of the attorney's fees requested in this case is so great that requiring a state official to pay it would have the same tendency to cause hesitation in the performance of vital public functions as a damage award. In the absence of express statutory language, this Court will not assume that Congress intended the Civil Rights Attorney's

Fees Awards Act to undercut the doctrine of limited official immunity. Consequently, Skehan's claim for attorney's fees from Nossen in his individual capacity will be denied.

Skehan also seeks attorney's fees from the Defendants in their official capacities. In effect, he is attempting to recover attorney's fees from the Commonwealth of Pennsylvania through the state officials whom he has sued. Defendants contend that this claim of attorney's fees from the Commonwealth of Pennsylvania is barred by the Eleventh Amendment of the United States Constitution.[3] Although that amendment appears only to prevent suits against states in federal court brought by citizens from other states or by citizens or subjects of any foreign state, the federal courts have consistently interpreted it to bar actions for monetary damages brought by a citizen of a state against his own state. Hans vs. Louisiana, 134 U.S. 1 (1889); Fialkowski vs. Shapp, 405 F.Supp. 946 (E.D. Pa. 1975). In Fitzpatrick vs. Bitzer, 427 U.S. 445 (1976), the Supreme Court concluded that Congress possesses the power pursuant to § 5 of the Fourteenth Amendment to limit the application of the Eleventh Amendment. It is clear that Congress derives the authority to implement the Attorney's Fees Awards Act from the Fourteenth Amendment. The purpose of the Civil Rights Attorney's Fees Awards Act is to compensate counsel who represent prevailing litigants in various claims brought pursuant to several different civil rights statutes. But the Civil Rights Attorney's Fees Awards Act contains no language expressly allowing the recovery of attorney's fees from the states.

[3] Amendment XI of the United States Constitution reads:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In Fitzpatrick vs. Bitzer, *supra,* the Plaintiffs sought damages from the State of Connecticut pursuant to Title VII of the Civil Rights Act of 1964. In 1972, Congress amended the language of that statute to permit an employee of a state or political subdivision to sue his or her public employer pursuant to that act. Thus, in *Fitzpatrick,* by concluding that § 5 of the Fourteenth Amendment limited the applicability of the Eleventh Amendment and allowed a state to be held liable for damages, the Supreme Court enforced the specific statutory language of Congress. The Attorney's Fees Awards Act contains no such language authorizing a recovery against a state.

This Court is of the view that Congress must exercise by express and clear language its power to limit the applicability of the Eleventh Amendment. Only two reported decisions have considered the issue of whether a Plaintiff in a § 1983 action can recover attorney's fees from a state pursuant to the Civil Rights Attorney's Fees Awards Act. The entire analysis of this matter presented by the Eighth Circuit in Finney vs. Hotto, 548 F.2d 740 (8th Cir. 1977) is as follows:

> "Since the Act was passed by Congress under, *inter alia,* the enabling clause of the fourteenth amendment, S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5 U.S. Code Cong. & Admin. News, 1976, p. 5908 the award of attorneys' fees is not barred by the eleventh Amendment. Fitzpatrick vs. Bitzer (citation omitted).

The Eighth Circuit does not discuss the need for statutory language indicating the Congressional intent to limit the applicability of the Eleventh Amendment.

In Wade vs. Mississippi Cooperative Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976), the Court noted that Congress did not expressly authorize a recovery of attorney's fees from the states in the Civil Rights Attorney's Fees

Awards Act as it had expressly authorized a recovery of damages from the states pursuant to Title VII of the 1964 Civil Rights Act. The Court concluded that the legislative history of the Attorney's Fees Act provided the necessary indication of Congressional intent. This Court finds that rationale unpersuasive. In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment. See Employees of the Department of Health and Welfare vs. Missouri, 411 U.S. 279 (1973).

Even if the Eleventh Amendment is not a bar to Skehan's claim for attorney's fees against the Commonwealth of Pennsylvania, this Court would not award such fees for the legal work performed concerning termination without a prior termination hearing because in our view it would be unjust in this case. The Court would exercise its discretion pursuant to the Civil Rights Attorney's Fees Awards Act not to award the fees requested by Skehan. As stated above, and in the Court's opinions of May 9, 1973, 358 F.Supp. 430 (M.D. Pa. 1973), and May 18, 1977, Skehan's termination on October 19, 1970 by college officials was caused by his failure to meet his classes at assigned times. Skehan's conduct was in my view egregious. To award attorney's fees of $87288.50 to Skehan would be to place an unconscionable and unjust burden upon the taxpayers of the Commonwealth of Pennsylvania and would penalize the Commonwealth of Pennsylvania and its taxpayers for the attempt of Bloomsburg State College officials to administer its affairs in an orderly and efficient manner.

This analysis does not apply to a request for attorney's fees for time expended pursuant to the 5e issue. If this Court is found to be in error by the Court of Appeals in its conclusion that the Eleventh Amendment bars Skehan's claim for attorney's fees, the Court believes that Skehan is entitled to attorney's fees on the 5e issue. Because no time was expended on that matter until this case was remanded to this Court from the United States Court of Appeals in July, 1976 any claim for attorney's fees prior to that date would be unjustified.

In the light of the foregoing, Skehan's claim for attorney's fees from the Defendants in their official capacities will be denied.

Skehan also claims expenses which he allegedly incurred while aiding his attorneys in the preparation of his case. These expenses include the cost of telephone calls to his attorneys and the cost of travelling to confer with his attorneys. Such expenses are not authorized by the Civil Rights Attorney's Fees Awards Act of 1976 and do not come within the definition of costs as that term is used in the Federal Rules of Civil Procedure. Consequently, Skehan's request for expenses will be denied. Because each party was at fault in this case, it seems appropriate that each party shall bear his own costs.

IV. Conclusions of law.

1. Skehan is entitled to reinstatement to the position he had at Bloomsburg State College on October 15, 1970.

2. The clean hands doctrine of equity prevents Skehan from being reinstated to full status as a faculty member of Bloomsburg State College.

3. Skehan is not entitled to recover attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 on his damage action against Nossen individually because Nossen was the prevailing party on the immunity issue.

4. Skehan's claim for attorney's fees pursuant to the Attorney's Fees Awards Act from the Defendants in their official capacities is barred by the Eleventh Amendment to the United States Constitution and by sovereign immunity.

5. An award of attorney's fees against Nossen individually would be unjust.

6. An award of attorney's fees against the Defendants in their official capacities for failing to afford a hearing prior to the termination of Skehan's employment would be unjust.

7. Skehan is not entitled to attorney's fees from the Defendants as to the issue that his employment contract was not renewed beyond 1970-1971 because of his involvement in campus activities and his expression of views hostile to the Administration of Bloomsburg State College for the reason that the Defendants were the prevailing parties.

8. Skehan is not entitled to expenses.

An appropriate order will be entered.

MUIR,
U.S. District Judge.

Dated: July 20, 1977

Order

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,
Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,
Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

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1. Skehan's claim for attorney's fees and expenses is denied.

2. The Defendants shall reinstate Skehan to the suspended status which he held on October 15, 1970.

3. The Committee on Professional Affairs shall conduct proceedings concerning Skehan's claim that the decision not to renew his employment contract was for reasons violative of academic freedom within 90 days after the date of this Order.

4. A decision by the Committee on Professional Affairs shall be rendered within 30 days of the date it completes the proceedings concerning Skehan.

5. If after the recommendation of the Committee on Professional Affairs has been received, the President of

Bloomsburg College expresses his conviction that non-renewal proceedings should begin, he shall notify Skehan by certified mail, return receipt requested, within 10 days of the action of the Committee on Professional Affairs. The notice shall contain the information required by 9b of the Statement of Policy of Bloomsburg College in force in 1970.

6. Skehan shall, if he desires further review of the President's decision, within 10 days of the receipt of the notice from the President request further consideration in a letter to the President containing the information required by 9c of the Statement of Policy of Bloomsburg College in force in 1970.

7. The President of Bloomsburg College shall indicate to Skehan in writing within ten days of the receipt of Skehan's letter whether he reaffirms his decision not to renew Skehan's contract.

8. If thereafter Skehan promptly requests a hearing on non-renewable it shall be held by the ad hoc hearing committee within 30 days after receipt of the request therefor by Skehan. The members of the ad hoc hearing committee shall be selected according to the requirements of 9d of the Statement of Policy of Bloomsburg College in force in 1970.

9. The Chairman of the ad hoc committee shall present his report to the Board of Trustees of Bloomsburg College within 30 days after the date of the completion of the hearing by the ad hoc committee.

10. The Board of Trustees shall decide whether to renew Skehan's contract within 30 days after the date the Chairman of the ad hoc committee submits his report and shall give Skehan prompt notice of its decision.

11. A pretermination hearing may, at the option of the President of Bloomsburg State College, be held within 30 days after the Board of Trustees determines whether or not to renew Skehan's employment contract or within 30 days after another final decision has been reached on the question of renewal or non-renewal, whichever shall first occur.

12. If no pretermination hearing is conducted within the time period set forth in the preceding paragraph, Skehan shall be reinstated to the position he held on October 7, 1970.

13. Each party shall bear his own costs.

MUIR,
U. S. District Judge.

Dated: July 20, 1977

5/18/77—Opinion (5e) Liability

SKEHAN v. BD. OF TR. OF BLOOMSBURG STATE COLLEGE

Cite as 431 F.Supp. 1379 (1977)

OPINION

MUIR, District Judge.

Introduction.

Skehan filed his complaint in the United States District Court for the Eastern District of Pennsylvania on October 10, 1972. On December 22, 1972, the case was transferred to this Court. On January 11 and 12, 1973, a hearing on his request for a preliminary injunction was held. On January 31, 1973, the Court declined to issue a preliminary injunction. In

March, 1973, the parties agreed that no further testimony would be necessary in order for the Court to reach its final decision on the matter. On May 11, 1973, judgment in favor of Skehan in the amount of $1.00 together with costs was entered. On June 9, 1973, Skehan filed a notice of appeal. On May 3, 1974, the Court of Appeals remanded the case to this Court for further findings with respect to three enumerated issues of fact. *Skehan v. Board of Trustees,* 501 F.2d 31 (3d Cir. 1974). On July 30, 1974, the case was placed on the November, 1974 trial list. On October 11, 1974, after Skehan had received an extension from Justice Brennan to November 8, 1974 within which to file a petition for certiorari, the case was continued to the January, 1974 trial list to avoid the possibility of simultaneous proceedings in this Court and the United States Supreme Court. On October 31, 1974, Skehan's application for a stay of all proceedings pending the United States Supreme Court's decision upon his petition for writ of certiorari was denied because no petition for a writ of certiorari had been filed by Skehan. On November 8, 1974, Skehan filed a petition for the issuance of a writ of certiorari and the case was deleted from the January, 1975 list. On May 27, 1975, the Supreme Court granted the writ, vacated the judgment of the Court of Appeals, and remanded the case to the Circuit Court. *Skehan v. Board of Trustees,* 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975). On June 30, 1975, the Court of Appeals notified this Court of that decision and requested the record. On June 21, 1976, the Court of Appeals filed a decision again remanding this case to the Court for further findings with respect to two of the three factual issues which it had enumerated in its first opinion. *Skehan v. Board of Trustees,* 538 F.2d 53 (3d Cir. 1976). In addition, the Court of Appeals directed this Court to make findings of fact concerning the good faith of Defendant Nossen in failing to give Skehan a hearing prior to his termination as a professor at Bloomsburg State College. On July 15, 1976, and promptly after the mandate was issued, the case was placed on this Court's September, 1976 trial list. On August 27, 1976, it was continued at the request of counsel for both sides to the December, 1976 trial list. At the pre-trial conference on December 1, 1976, it became apparent that certain issues could be resolved without trial and that the remaining issues could most effectively be handled by continuing the case until January, 1977. On January 3, 1977, this case was further continued on Skehan's motion to the March, 1977 list because of the sudden death of the wife of Skehan's counsel. On February 28, 1977, this Court granted Skehan's motion to continue the case to the April, 1977 list because another of his counsel was undergoing surgery. On January 10, 1977, the Court denied Skehan's motion for leave to submit additional testimony concerning whether the decision not to renew Skehan's contract after the 1970-71 year was based on a stance on campus issues with which the administration disagreed. On February 11, 1977, the Defendants filed a motion and a brief for judgment in their favor on this claim. On March 15, 1977, Skehan filed a motion and a brief for judgment in his favor on this issue. On March 24, 1977, the Court issued an Opinion which found that the non-renewal of Skehan's contract did not stem from his stance on campus issues.

On April 14 and 15, 1977, the Court as required by the Court of Appeals heard testimony without a jury concerning whether the nature of Article 5e[1] of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College was contractual under Penn-

[1] 5e conforms to the numbering system in the Statement of Policy. The Article is referred to as 5(e) in the Circuit Court opinion.

sylvania law. The Court further heard testimony and argument as to whether Skehan had a right to the procedures set forth in 5e and, if so, whether the Defendant Nossen acted in good faith in failing to provide Skehan with these procedures. The Court also heard evidence concerning Nossen's good faith in not affording Skehan a hearing prior to his termination in October, 1970. This Court has previously held that the failure to provide a hearing was a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Skehan v. Board of Trustees of Bloomsburg State College, et al.*, 358 F.Supp. 430 (M.D.Pa. 1973).

[1, 2] The 5e issue was never set forth in Skehan's complaint. In addition, it was never raised at the hearing in January, 1973. Counsel for both sides stated in open court on April 15, 1977 that the 5e issue was not raised, briefed, argued or alluded to before the Court of Appeals. The 5e issue first surfaced in the Opinion of the Court of Appeals. Failure to set forth the claim in any recognizable form in the complaint runs afoul of the specificity requirement imposed by the Court of Appeals in § 1983 cases. *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Fialkowski v. Shapp*, 405 F.Supp. 946 (E.D. Pa. 1975). Because the issue was never raised by the Plaintiff at any stage of the proceedings in this Court, the Court of Appeals or the United States Supreme Court, it was, in my view, clearly waived by him. Creation of the issue by the Court of Appeals is, in my view, not consistent with our jurisprudential system. *G. H. McShane Company, Inc. v. McFadden*, 554 F.2d 111 (3d Cir. 1977); *System Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131 (3d Cir. 1977). *Harbor Towing v. SS Calmar*, 507 F.2d 720 (4th Cir. 1974); *Hoblik et al. v. U. S.*, 151 F.2d 971, 972 (8th Cir. 1945). However, I have been directed by the

Court of Appeals to consider the 5e issue and since I have taken an oath faithfully to perform all the duties incumbent upon me agreeably to the laws of the United States, I will treat the 5e issue as fully as if it had been alleged in the complaint, had been considered and decided adversely to the Plaintiff at the first trial, and had been briefed, argued, and decided in Plaintiff's favor on appeal.

Findings of Fact.

1. Plaintiff Joseph T. Skehan was Associate Professor of Economics at Bloomsburg State College appointed in January, 1969.

2. Defendant Nossen was at all times pertinent to this case President of the College.

3. At the April 26, 1968 meeting of the Board of Trustees of Bloomsburg State College, the Trustees voted unanimously to adopt the "Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College," effective September 1, 1968 (Undisputed).

4. The second and third paragraphs of the document "A Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College" have the following recitation:

> "Bloomsburg State College, wishing to insure the more effective services of faculty members, is willing to take steps to protect their economic security.
>
> "The adoption of any policy regarding employment involves a voluntary limitation of authority of the President and the Board of Trustees ***." (Undisputed).

5. The document "A Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College" provides that:

> "As a citizen and a member of the teaching profession, the faculty member is entitled to speak and act with freedom from institutional censorship and discipline." (Undisputed)

6. The "Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg College" provides that "[i]t is understood that this is a statement of policy which will be honored in all practical situations." (Undisputed)

7. A section of the Statement of Policy entitled "Legal Limitations and/or Revisions" provides, "All provisions herein stated will be held to be in effect unless found to contravene present or future statutes of the Commonwealth. If a revision of the policy is necessary, the revision shall be a matter of negotiation involving the President of the College, the Board of Trustees, and the Faculty." (Undisputed)

8. By memorandum dated February 3, 1969, to "New Faculty Members," the President of Bloomsburg State College requested that the recipients read the "Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College" and "date and sign the lower portion of this memorandum" and return it to the President's office. (Undisputed)

9. On March 4, 1969, Plaintiff signed and returned to the President's office the form attached to the "Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College" which recited that he had read the Statement. (Undisputed)

10. On July 27, 1970, Defendant Nossen wrote to Deputy Attorney General Williams concerning institution of a suit against the college by another college professor and enclosed a summary of *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 972 (W.D.Wis.1970) which related to the constitutional rights of a non-tenured faculty member who was terminated without a prior hearing.

11. By letter dated August 6, 1970, Defendant Nossen wrote to the Associate Secretary of the American Association of University Professors and assured him that ". . . this college followed all appropriate procedures in the case of Dr. Maxwell Primack. When he asked for a hearing before the college Committee on Professional Affairs, he was granted that hearing, before the Professional Affairs Committee, which rejected his plea."

12. The Committee on Professional Affairs is described in the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College as a committee of the faculty. (Undisputed)

13. At its February 27, 1970, meeting, the Board of Trustees voted unanimously to accept the recommendation of Defendant Nossen, based upon "a unanimous evaluation by the Department Chairman, Division Director and Dean of Instruction," that Plaintiff be notified that he was reappointed for the 1970-71 academic year, with that year being the terminal year of his appointment. (Undisputed)

14. In February, 1970, Dr. Hoch, Dean of Instruction, orally informed Skehan that he was recommending that he not be renewed beyond June, 1971.

15. Defendant Nossen did not consult legal counsel regarding the decision not to renew Plaintiff's appointment for the 1971-72 academic year. (Undisputed)

16. Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College provides that "[i]f a faculty member's service to the College is to be terminated during the first two years of the probationary period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of an infringement of academic freedom. If a faculty member of professional [sic] rank, on probationary appointment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom his allegation shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in No. 9 of this document will be followed." (Undisputed)

17. Defendant Nossen did not consult legal counsel at any time prior to his dismissal of Plaintiff concerning the meaning of Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College.

18. The Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College in ¶ 4 provides that "[d]uring the second academic year of the probationary period, the President of the College shall inform the faculty member on or before December 15, whether or not his services will be desired for the following academic year. The faculty member shall indicate in writing his acceptance of the appointment within ten (10) days." (Undisputed)

19. Defendant Nossen's letter of May 19, 1970, in which he notified Plaintiff of the Board of Trustees' action confirming Plaintiff's non-renewal, included at the bottom the following statement which Plaintiff was requested to fill out, sign, and return to Defendant Nossen's office:

> "I ..... accept ..... decline the offer of reappointment for the 1970-71 academic year and understand that this is the terminal year of employment at Bloomsburg State College.
>
> Date ..... Signed ....." (Undisputed)

20. By letter dated May 29, 1970, Plaintiff informed Defendant Nossen that "[a]ccording to the provisions on page three of Bloomsburg State's 'Statement of Policy for Continuous Employment and Academic Freedom,' I have a reappointment for the Academic year 1970-71. * * * I intend to fulfill the 1970-71 appointment." (Undisputed)

21. By letter dated June 1, 1970, Defendant Nossen informed Plaintiff that he could not accept his letter of May 29, 1970, as an acceptance of reappointment for the coming year, and that if Plaintiff did not sign the offer of appointment sent to him, he could consider himself terminated for the coming academic year. (Undisputed)

22. By letter of June 10, 1970, Plaintiff informed each member of the Board of Trustees that he had accepted Defendant Nossen's offer of reappointment for the 1970-71 academic year within the prescribed 10 day period but had subsequently been notified by Defendant Nossen that he should consider himself terminated if he did not sign the release statement at the bottom of Defendant Nossen's letter offering the appointment. (Undisputed)

23. By letter dated June 15, 1970, Defendant Nossen informed Plaintiff that Plaintiff's "refusal, to this point, to return the contract in accord with * * * prescribed

procedures continues to indicate * * * your disregard for college procedures," because Plaintiff would not accept his reappointment by signing the "contract form which is applicable to all persons offered appointment." (Undisputed)

24. By his letter of May 19, 1970, Defendant Nossen notified Plaintiff that "prior to the expiration of your first year of service you were notified that your contract would not be renewed after the 1970-71 academic year. This was confirmed by Board of Trustees action on February 27, 1970." (Undisputed)

25. By letter of May 29, 1970, Plaintiff informed Defendant Nossen that "no notification of any decision about nonrenewal has reached me." (Undisputed)

26. By his letter dated May 29, 1970, Plaintiff informed Defendant Nossen that "[r]eview of appropriate college regulations and professional procedures indicates a series of probable infringements of due process in the question of nonrenewal after June, 1971. I may decide to have the matter reviewed by appropriate agencies in due course." (Undisputed)

27. Almost from the beginning of classes in September, 1970, Plaintiff refused to teach his classes regularly, engaged another professor to teach his classes although he was in the classroom, and defied the orders of his superiors to cease the practice.

28. By letter of September 21, 1970, Plaintiff notified Defendant Nossen that "I hereby invoke article 5e of the Bloomsburg State College 'Statement of Policy for Continuous Employment and Academic Freedom,' affirming that the decision not to reappoint me has been caused by considerations violative of academic freedom." (Undisputed)

29. Defendant Nossen did not respond to Plaintiff's letter of September 21, 1970.

30. Article 9 of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College provides that administrative officers shall discuss a faculty member's dismissal with him and, "if the matter has not been resolved at this point, it shall then be referred to the Committee on Professional Affairs for the Faculty * * *." If after consideration and recommendation by the Committee on Professional Affairs, the President nevertheless reaffirms his action, "the faculty member may request that the President initiate the procedure for a hearing * * before an ad hoc committee elected by the Faculty. The President of the College must notify the Faculty of the College that such a committee must be elected." (Undisputed)

31. Defendant Nossen discussed Plaintiff's September 21, 1970, letter invoking Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom and the meaning of Article 5e with Trustees William Lank and William Booth, "neither of whom made any suggestion on the need for further action on the matter." (Undisputed)

32. Nossen had never previously received a letter similar to the one submitted by Skehan invoking Article 5e and had never referred a request to invoke 5e to the Committee on Professional Affairs. After receiving Skehan's letter of September 21, 1970, Nossen did not read Article 5e.

33. Nossen assumed that the Committee on Professional Affairs was the proper body to initiate the procedures under Article 5e.

34. Plaintiff Skehan did not apply to the Committee on Professional Affairs or any member thereof for a hearing on his 5e claim and did not send to the Committee on Professional Affairs or any member thereof a copy of his letter to Defendant Nossen invoking 5e.

35. Nossen did not know that Skehan had a constitutional right to the procedures of 5e.

36. By letter dated October 9, 1970, Defendant Nossen notified Plaintiff that he was relieving him "of all classroom responsibilities, pending a final hearing."

37. Plaintiff's suspension was caused by his refusal to teach his classes in defiance of orders from his superiors.

38. Defendant Nossen consulted Trustees William Lank and William Booth, and attorney William Williams of the Department of Justice of the Commonwealth of Pennsylvania, concerning the course of action set forth in his letter of October 9, 1970, to Plaintiff in which he informed Plaintiff that he was "relieving [him] of all classroom responsibilities, pending a final hearing."

39. No "final hearing" as referred to in Defendant Nossen's letter of October 9, 1970, was held prior to Plaintiff's dismissal. (Undisputed)

40. Notwithstanding his suspension on October 9, 1970, Plaintiff continued to meet with classes at the regularly scheduled times and places.

41. By letter dated October 19, 1970, with copy to William Williams, Deputy Attorney General of Pennsylvania, Defendant Nossen notified Plaintiff that he was removed from the payroll effective October 17, 1970, "subject to final approval by the Board of Trustees." (Undisputed)

42. At its October 23, 1970 meeting, the Board of Trustees received an "oral report" from Defendant Nossen regarding the activities of Plaintiff and was notified that Plaintiff had been "relieved of . . . teaching responsibilities with full pay following oral and written directives of College administrators requesting [him] to meet [his] assigned classes, directives which were not followed."

43. At its October 23, 1970, meeting, the Board of Trustees heard read into the record the correspondence between Defendant Nossen and Plaintiff regarding the scheduling controversy which gave rise to Plaintiff's removal from teaching responsibilities. At the conclusion of the presentation of correspondence between Defendant Nossen and Plaintiff regarding the scheduling controversy, Defendant members of the Board of Trustees voted unanimously to approve the October 19 action of Defendant Nossen terminating Plaintiff, effective October 17. (Undisputed)

44. No member of the Board mentioned that the Constitution might require a pretermination hearing.

45. Nossen did not know that Skehan had a constitutional right to a pretermination hearing.

46. By letter of October 24, 1970, Defendant Nossen notified Plaintiff that he was "fully and finally terminated at the College effective October 17, 1970," as a result of the Board of Trustees' action at its meeting on October 23, 1970, confirming the prior dismissal action taken by Defendant Nossen. He added that there was "no other possible alternative" to this action. (Undisputed)

47. Despite Plaintiff's termination on October 19, 1970, the Plaintiff refused to recognize the same and continued to

meet with students in accordance with pre-existing schedules and in the rooms regularly scheduled for such classes.

48. Plaintiff informed his students that they would receive academic credit from Bloomsburg State College for attending his classes.

49. The college officials were obliged to schedule classes at different locations because of Plaintiff's activities.

50. The Administration at Bloomsburg State College informed Skehan's students, after he was relieved of classroom responsibilities, that no credit would be given for attending Skehan's classes.

51. Plaintiff refused to vacate his office after the above mentioned suspension and termination.

52. The Plaintiff's activities just mentioned caused great confusion among the students and the faculty.

53. The students were uncertain as to which class or classes to attend.

54. Defendant Nossen filed an action against Plaintiff in the Court of Common Pleas of Columbia County, Pa. in December, 1970 to restrain the Plaintiff from conducting classes and occupying classrooms in defiance of administrative orders after his termination as a faculty member.

55. On March 12, 1971, the Court of Common Pleas with Honorable G. Thomas Gates of Lebanon County, specially presiding by order of the Supreme Court of Pennsylvania, entered a consent decree enjoining Plaintiff from conducting classes at Bloomsburg State College.

56. Defendant Nossen kept the Department of Justice of the Commonwealth of Pennsylvania informed concerning

developments in the Skehan controversy and consulted with Deputy Attorney General Williams on a regular basis concerning this matter.

57. The Superintendent of Education had two attorneys on his staff during the years 1968-1970. (Undisputed)

58. The attorneys on the staff of the Superintendent of Education were available for consultation with Defendant Nossen concerning his official responsibilities during this period.

59. No one in the Department of Justice of the Commonwealth of Pennsylvania ever informed Nossen prior to the filing of this suit that it was unconstitutional to terminate Skehan in October, 1970 without a prior hearing.

60. Nossen conferred with the American Association of University Professors concerning Bloomsburg State College's dispute with Skehan.

61. Skehan received a hearing concerning his termination in October, 1970 on December 1, 1970.

62. Member of the Board of Trustees Frank D. Croop received a legal degree from Dickinson School of Law, had served as a member of the Pennsylvania Constitutional Convention and had served as an arbitrator concerning public employment contracts (Undisputed).

63. Croop was present when the Board of Trustees of Bloomsburg College approved the firing of Skehan on October 23, 1970.

64. Member of the Board of Trustees George W. Heffner from 1968 to the present has been Judge of the Court of Common Pleas of Schuylkill County, Pennsylvania.

65. Heffner was present when the Board of Trustees of Bloomsburg College approved the firing of Skehan on October 23, 1970.

66. On October 21, 1970, when Skehan went to Nossen's office to request a salary check, Nossen pounded on the table and stated that he intended to "ruin" and "destroy" Skehan.

Discussion.

[3] Nossen contends that even if Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College creates a contractual right for a hearing when a nontenured professor alleges that the decision not to renew him for the following academic year was based upon considerations violative of academic freedom, such an entitlement only arises against the college, not against any officer or official of that institution and therefore the Court lacks jurisdiction over this issue. Nossen's argument assumes that Pennsylvania law determines who can be sued for a constitutional violation pursuant to 42 U.S.C. § 1983. Pennsylvania law is referred to in order to determine if a contractual interest exists. If the contract interest is created by state law, then certain due process procedures required by the Fourteenth Amendment of the United States Constitution attach. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The question as to who is liable is determined by federal law, not state law. Consequently, the Court rejects Nossen's contention that it lacks jurisdiction over this issue.

[4] To determine whether 5e creates a contract claim pursuant to Pennsylvania law, the entire document in which it is contained, the Statement of Policy, must be examined. The

Statement of Policy was adopted by the Board of Trustees at Bloomsburg State College on April 26, 1968. It is prefaced by the following statement:

> "Bloomsburg State College, wishing to insure the more effective services of faculty members is willing to take steps to protect their economic security."
>
> "The adoption of any policy regarding employment involves a voluntary limitation of authority of the President and the Board of Trustees as set forth in the administrative code."
>
> * * *
>
> "It is understood that this Statement of Policy should be honored in all practical situations."

According to the policy statement, all of its provisions are held to be in effect unless they contravene present or future statutes of the Commonwealth of Pennsylvania. If revisions of policy are required, the Statement of Policy provides that they shall be the subject of negotiation involving the President of the College, the Board of Trustees, and the faculty. The Statement of Policy also requires that each member of the faculty be given a copy of it at the time of his initial employment and that he acknowledge familiarity with it. Article 5e of the Statement of Policy sets forth certain procedures to be followed when a faculty member is terminated during the first two years of his probationary period. In addition, it provides that when a faculty member of professional rank on probationary appointment alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his charges shall be given preliminary review by the Committee on Professional Affairs.

The Statement of Policy sets forth its purpose in terms that meet the general requirement that a contract be supported by consideration. The first paragraph of the Statement of Policy states that in an effort to obtain more effective services from its faculty members Bloomsburg State College offers procedural steps to protect their economic security.

[5, 6] Defendant Nossen contends that the Statement of Policy is merely a fortuitous promise which the administration can honor or disregard according to its desires. Pennsylvania law requires that for there to be an enforceable contract, the nature and extent of its obligations must be certain. *Lombardo v. Gasparini,* 385 Pa. 388, 393, 123 A.2d 663, 666 (1956). Nossen maintains that the following sentence in the Statement of Policy establishes that there is no consideration and that the nature of the obligations are uncertain: "It is understood that this is a statement of policy which should be honored in all practical situations." The term "practical situations" can easily be interpreted by a fact-finder. It does not render a contract unenforceable. In *Joynes v. Pennsylvania Rail Company,* 235 Pa. 232, 83 A. 1016 (1912), the Supreme Court of Pennsylvania upheld the enforcement of a contract which depended upon the practicality of the circumstances. The promise given by the policy statement is not indefinite but may only be voided when the college or its agents can establish that compliance is impractical.

Defendant Nossen also contends that because of Skehan's allegedly untimely presentation of his claim under Article 5e, it was not practical for him to adhere to its procedures. In February of 1970, Skehan was orally notified that he was not going to be reappointed after the 1970-71 academic year. The decision not to reappoint Skehan was approved by the Board of Trustees at Bloomsburg State College on February 27,

1970. Skehan was sent written notification of the decision not to reappoint him by a letter of May 19, 1970, written by Nossen. On September 21, 1970, Skehan wrote a letter to Defendant Nossen, invoking Article 5e. Neither Article 5e nor Article 9 of the Statement of Policy sets forth any time limitations concerning the submission of the claim by a faculty member pursuant to Article 5e. Nossen argues that because Skehan sought to invoke 5e at the same time he was refusing to adhere to the class schedules established by the administration of the college it was not possible to implement 5e. No evidence was presented to support this contention.

[7, 8] Under Pennsylvania law when a contract is silent as to the time of its performance, a requirement of performance within a reasonable time is read into the contract. Thus, as long as Skehan submitted his claim within a reasonable time, he would be entitled to the procedures of Article 5e. Because the academic year at Bloomsburg ended on May 24, Skehan maintains that he waited until classes commenced in September when the members of the Committee on Professional Affairs would be on campus. In waiting four months to submit his case pursuant to Article 5e he acted within a reasonable time.

[9] Nossen maintains that since Skehan failed to meet his assigned classes in September, 1970, he was not entitled to the protection of Article 5e. The very purpose of Article 5e is to enable a professor charged with not properly performing his duties to establish that he was discharged for exercising academic freedom. Because Skehan had a property interest in the procedures of Article 5e, the failure to follow those procedures violated the Fourteenth Amendment of the United States Constitution.

[10, 11] The Defendant Nossen can avoid liability if he establishes by a preponderance of the evidence that he meets the good faith test set forth in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 232 (1975). In *Wood*, the Court stated that an official is not immune to liability for damages under § 1983 if he knew or reasonably should have known that the action he took was (1) within his sphere of official responsibility and would violate the constitutional rights of the individual affected or was (2) with the malicious intention to deprive the individual of constitutional rights or cause him other injury. That is not to say that officials are charged with predicting the future course of constitutional law. A compensatory award with be appropriate only if the official acted with an impermissible motivation or with such disregard of the Plaintiff's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. Thus, this test requires both so-called objective and subjective good faith. Nossen established by a preponderance of the evidence that his failure to initiate the procedures of 5e for Skehan was without malice. Nossen testified that he was not aware that he had responsibility to initiate 5e proceedings. Nossen's statement to Skehan that he intended to ruin him occurred approximately one month after Skehan had sent the letter to Nossen invoking 5e. Nossen's comment obviously was caused by Skehan's defiance of the college authorities in meeting with classes after he was terminated. The situation deteriorated to such a point that the College was obliged to obtain an injunction to prevent Skehan from conducting classes.

[12] An examination of Article 5e and Article 9 of the Statement of Policy of the college by the Court has not shown that they set forth whose responsibility it is to initiate their

procedures. Article 5e states that "if a faculty member of professional rank on probationary appointment alleges that a decision not to reappoint him has been caused by considerations violative of the academic freedom, his allegation should be given preliminary consideration by the Committee on Professional Affairs . . ." Nothing is said concerning who is to submit the matter to the committee, the faculty member, the President of the College, or some other administrator. Article 9 states that if a faculty member has been recommended for dismissal, the appropriate administrative officers will discuss the matter with him in a personal conference and that if the matter has not been resolved at this point, it shall then be referred to the Committee on Professional Affairs of the faculty. Again, this provision does not indicate who is to refer the matter to the Committee. It was reasonable for Nossen to conclude that it was not his responsibility to submit Skehan's letter to the Committee on Professional Affairs of the faculty. Nossen testified that he could not recall referring such a request to that committee in any other case. Although Nossen indicated that at the time he received Skehan's letter calling for an invocation of the procedures of Article 5e he did not read Article 5e, this action was not unreasonable. Even if he had read 5e, he would have received little guidance as to the appropriate course of conduct. No reason existed for Nossen to seek legal counsel. No event occurred to cause Nossen to believe that he had responsibility for initiating the procedures under 5e. A public official is only required to seek legal counsel when he reasonably should suspect that the actions he is about to take may be unlawful.

[13] Skehan should have at least submitted a copy of his letter of September 21 to the Committee on Professional Affairs. Requiring Nossen as college president to submit

correspondence directed to him to a committee of the faculty as well known to Skehan as to Nossen places an unreasonable burden upon Nossen. A college president receives literally dozens of letters a day. He simply cannot determine to whom each complaint or problem should have been addressed. The aggrieved party must bear the responsibility for chanelling his claim to the proper party.

[14, 15] There was no clear and established right pursuant to the Fourteenth Amendment to the procedures contained in Article 5e in 1970. The constitutional claim depends upon a contractual obligation to provide these procedures. It was not the clear and established law of Pennsylvania in 1970 that the Statement of Policy created a binding agreement. In the light of the foregoing, the Court concludes that Nossen has established by a preponderance of the evidence that he acted in good faith and in a reasonable manner when he did not submit Skehan's request for an invocation of Article 5e to the Committee on Professonal Affairs.

This Court has previously found that Skehan's termination on October 19, 1970 without a prior hearing violated the due process clause of the Fourteenth Amendment of the United States Constitution. Nossen is entitled to immunity from damages for failure to provide Skehan with a hearing if he can establish by a preponderance of the evidence that he acted in good faith and in a reasonable manner. He has established by a preponderance of the evidence that his termination of Skehan without a prior hearing was not malicious. Nossen frequently consulted with Deputy Attorney General Williams concerning the difficulties between Skehan and the College. In addition, he also requested advice from the American Association of University Professors. He did grant Skehan a hearing approximately one and one half

months after he was terminated. While this hearing was constitutionally inadequate since it was after the termination, it does tend to show a lack of malice. Although on October 21, 1970 when Skehan went to Nossen's office to request a salary check, Nossen pounded on the table and stated that he intended to ruin or destroy Skehan, this does not significantly diminish Nossen's showing of no malice. This incident occurred on October 21, two days after Skehan had been terminated. Before firing Skehan Nossen had suspended him from teaching on October 9, 1970. His actions were designed to prevent Skehan from teaching classes at previously assigned times. After Skehan's suspension Skehan did continue to meet with his classes. Even after he was terminated on October 19, 1970, Skehan still met with his classes. Nossen was understandably concerned that this was creating confusion among the students. The administration was advising them that they would no longer receive credit from attending these classes and Skehan was stating that they would receive credit if they attended the classes taught by him. It is probable that Nossen's statement resulted from Skehan's unwillingness to stop meeting with his classes even after he had been terminated.

Nossen must also establish by a preponderance of the evidence that he did not know and reasonably need not have known that depriving Skehan of a pretermination hearing violated due process. *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 62 (3d Cir. 1976). In *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 232 the Supreme Court stated that a public official must establish, in order to escape liability, that he had not violated a clearly established constitutional right. Thus, this Court must determine whether in October, 1970 it was the law of the land that

a nontenured professor at a state college was entitled to a hearing before termination. Skehan's counsel contends that *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and *Sindermann v. Perry*, 430 F.2d 939 (5th Cir. 1970) clearly establish that termination of a teacher without a prior hearing violated the due process clause in October, 1970. *Pickering* deals with the firing of a teacher for exercising his First Amendment rights. The opinion does not set forth due process standards for the termination of a teacher where no First Amendment claims are at issue. Although *Sindermann v. Perry, supra,* does require that a hearing be held before a teacher can be terminated, the holding of one circuit court does not render a constitutional principle clearly established. In the absence of a Supreme Court case or an opinion of the United States Court of Appeals for the Third Circuit creating a particular constitutional right, it would be unreasonable to require a president of a state college in Pennsylvania to know that his actions violated the Constitution.

Although Nossen did read a summary of the district court's opinion in *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 972 (W.D. Wis. 1970), this was not enough to put him on notice that Skehan had a right to a pretermination hearing. A decision of a district court in Wisconsin does not establish a clear principle of constitutional law for a college president in Pennsylvania. Nossen forwarded the summary to his counsel, Deputy Attorney General Williams.

In *Hostrop v. Board of Junior College, District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. den.*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976), the United States Court of Appeals for the Seventh Circuit was faced with a problem similar to that with which this Court is now faced. The Plaintiff was

discharged from his position as president of a college without being accorded a hearing in July, 1970. The Court concluded that "The first definitive holding that a termination of teachers' property interests in their employment contracts with state institutions required due process hearings was *Board of Regents of State Colleges v. Roth,*" 408 U.S. 564, 92 S.Ct. 2701; 33 L.Ed.2d 548 (1972). *Id.*, at 578, 92 S.Ct. 2701. This Court agrees with the analysis of the United States Court of Appeals for the Seventh Circuit.

The reasonableness of Nossen's lack of knowledge of due process requirements may also be measured by whether he consulted legal counsel. Nossen sent a copy of the letter terminating Skehan to Deputy Attorney General Williams. Williams never informed Nossen that Skehan had a right to a hearing prior to the termination. No one from the Department of Justice ever informed Nossen that he had violated Skehan's constitutional rights.

In the light of the foregoing, the Court concludes that Nossen acted in a reasonable manner when he terminated Skehan without a prior hearing on October 19, 1970 and did not violate a clearly established constitutional right.

Conclusions of Law.

1. Skehan possessed a contract right to the procedures of Article 5e of the Statement of Policy of Bloomsburg State College.

2. Skehan acted within a reasonable time in invoking his claim pursuant to Article 5e.

3. The failure to afford Skehan the procedures contained in Article 5e of the Statement of Policy of Bloomsburg State

College violated the due process clause of the Fourteenth Amendment of the United States Constitution.

4. Nossen acted in good faith and without malice in not affording Skehan the procedures of Article 5e.

5. Nossen acted in a reasonable manner and did not violate a clearly established constitutional right when he did not initiate the procedures of Article 5e of the Statement of Policy of Bloomsburg State College.

6. Nossen acted in good faith and without malice in terminating Skehan on October 19, 1970 without affording him a prior hearing.

7. Nossen acted reasonably and did not violate a clearly established constitutional right when he terminated Skehan without affording him a prior hearing.

An appropriate order will be entered.

Order

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

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1. The Clerk of Court shall enter judgment as to Defendant Nossen regarding Skehan's claim that his constitutional rights pursuant to Article 5e under the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College were violated.

2. The Clerk of Court shall enter judgment as to Defendant Nossen regarding Skehan's claim that Nossen is liable for damages for not affording him a due process hearing prior to his termination on October 19, 1970.

3. The above-captioned case is presently on the June trial list for disposal of any claims or issues still remaining.

MUIR,
U.S. District Judge.

Dated: May 18, 1977.

5/18/77—Judgment

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

JUDGMENT

This action came for trial before the Court, Honorable Malcolm Muir, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

1. That judgment is entered as to Defendant Nossen regarding Skehan's claim that his constitutional rights pursuant to Article 5e under the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College were violated.

2. That judgment is entered as to Defendant Nossen regarding Skehan's claim that Nossen is liable for damages for not affording him a due process hearing prior to his termination on October 19, 1970.

Dated at Williamsport, Pennsylvania, this 18th day of May, 1977.

DONALD R. BERRY,
Clerk of Court.

3/24/77—Opinion/Order/J.—1st Amend.

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

Appearances:

For Plaintiff—Bruce J. Terris, Esq., Suellen T. Keiner, Esq., Eleanor M. Granger, Esq., Terris, Needham, Keiner, Black & Hostetler, 1526 18th St., N.W., Washington, D.C. 20036.

Louise O. Knight, Esq., Clement & Knight, 118 Market St., Lewisburg, Pa. 17837.

For Defendants—Howard J. Levinson, Esq., J. Justin Blewitt, Jr., Esq., Department of Justice, State Capitol, Harrisburg, Pa. 17120.

OPINION

MUIR, *District Judge.*

Skehan filed his complaint in the United States District Court for the Eastern District of Pennsylvania on October 10, 1972. On December 22, 1972, the case was transferred to this Court. On January 11 and 12, 1973, the hearing on his request for a preliminary injunction was held. On October 31, 1973, the Court declined to issue a preliminary injunction. In March, 1973, the parties agreed that no further testimony would be necessary in order for the Court to reach its final decision on the matter. On May 11, 1973, judgment in favor of Skehan in the amount of $1.00, together with costs was entered. On June 9, 1973, Skehan filed a notice of appeal.

On May 3, 1974, the Third Circuit Court of Appeals remanded the case to this Court for further findings with respect to three enumerated issues of fact. Skehan vs. Board of Trustees, 501 F.2d 31 (3d Cir. 1974). On July 30, 1974, the case was placed on the November, 1974 trial list. On October 11, 1974, after Skehan received an extension from Justice Brennan to November 8, 1974 to file a petition for certiorari, the case was continued to the January, 1975 trial list to avoid the possibility of simultaneous proceedings in this Court and the United States Supreme Court. On October 31, 1974, Skehan's application for a stay of all proceedings pending the United States Supreme Court's decision upon his petition for a writ of certiorari was denied because no petition for a writ of certiorari had been filed by Skehan. On November 8, 1974, Skehan filed a petition for the issuance of a writ of certiorari

and the case was deleted from the January, 1975 list. On May 27, 1975, the Supreme Court granted the writ, vacated the judgment of the Court of Appeals, and remanded the case to the Circuit Court. Skehan vs. Board of Trustees, 421 U.S. 983 (1975). On June 30, 1975, the Court of Appeals notified the Court of that decision and requested the record.

On June 21, 1976, the Court of Appeals filed an opinion, again remanding this case to the Court for further findings with respect to two of the three factual questions which it had enumerated in its first opinion. Skehan vs. Board of Trustees, 538 F.2d 53 (3d Cir. 1976). On July 15, 1976, promptly after the mandate was issued, the case was placed on this Court's September, 1976 trial list. On August 27, 1976, it was continued at the request of counsel for both sides to the December, 1976 trial list. At the pretrial conference on December 1, 1976, it became apparent that certain issues could be resolved without trial and that the remaining ones could most efficiently be handled by continuing the case until January, 1977. On January 3, 1977, the case was further continued on Skehan's motion to the March, 1977 list because of the sudden death of the wife of Skehan's counsel. On February 28, 1977, this Court granted Skehan's motion to continue the case to the April, 1977 list because his counsel was undergoing surgery.

On remand, this Court is required *inter alia* to make findings of fact with respect to "whether the decision not to renew Skehan's contract after the 1970-71 was based on a stance on campus issues with which the administration disagreed." 538 F.2d at 63. On January 10, 1977, the Court denied Skehan's motion for leave to submit additional testimony with respect to this issue. On February 11, 1977, the Defendants filed a motion and a brief for judgment in their favor on this claim.

On March 15, 1977, Skehan filed a motion and a brief for judgment in his favor on this issue. The purpose of this opinion is to set forth findings of fact and conclusions of law regarding this matter.

FINDINGS OF FACT

1. Plaintiff Joseph T. Skehan was appointed Associate Professor of Economics at Bloomsburg State College in January, 1969.

2. Skehan's contract of employment was renewed for the 1969-1970 and the 1970-1971 academic years.

3. Skehan's employment status for the period of time from his appointment in 1969 to his dismissal in October, 1970, was that of a probationary faculty member.

4. Defendant Robert Nossen was President of Bloomsburg State College from 1969 to 1972.

5. During the Spring of 1969, Dr. Skehan urged the formation of independent faculty and student organizations.

6. In the Spring of 1969, Skehan composed and circulated to the faculty a memorandum analyzing a proposed constitution for the faculty.

7. Skehan was asked by a number of students to advise them regarding a constitutional proposal for the government of the student body.

8. In April, 1970, Dr. Skehan served as a faculty advisor to students at Bloomsburg who expressed their dissatisfaction with the appointment of Robert Nossen as President of College.

9. Skehan was active in the protest over the firing of Dr. Maxwell Primack, a professor in the Philosophy Department at Bloomsburg State College.

10. In the Spring of 1970, Skehan was appointed as a member of the Committee of the Local Chapter of the American Association of University Professors which was formed to investigate the firing of Dr. Primack.

11. In November and December, 1969, Skehan strongly protested against the dismissal of Professor Deake Porter of the Economics Department and acted as Porter's academic advisor in the matter.

12. In November, 1969, Skehan accompanied Professor Porter when Professor Porter met with Nossen to discuss Porter's dismissal and he protested Nossen's authority to criticize the manner and substance of Porter's teaching when these matters allegedly had not been the subject of a proper evaluation by the Economics Department.

13. When the issue of Professor Porter's dismissal was submitted to the Committee on Professional Affairs of the faculty on December 17, 1969, Skehan appeared before the Committee on Professor Porter's behalf and criticized the college administration for dismissing Porter in a manner allegedly violative of the standards of the American Association of University Professors which had been accepted by the college in October, 1969.

14. The day after Skehan appeared before the Committee on Professional Affairs in support of Professor Porter, he was called to Nossen's office where he met with Nossen and Dr. Hoch, the Dean of Instruction, and was told by Nossen that the purpose of the meeting was to evaluate Skehan's performance as a professor.

15. At the same meeting, Nossen stated that Skehan had submitted a petition to the college community concerning Professor Porter and said that petitions were not allowed at Bloomsburg State College because they were unprofessional and childish.

16. Dr. Skehan assumed an activist position on many of the issues raised on the campus community, a position often grating to the administration of Bloomsburg State College.

17. In February, 1970, Dr. Hoch orally informed Skehan that he was recommending that he not be renewed beyond June of 1971.

18. The decision not to reappoint Skehan after the 1970-71 academic year was approved by the Board of Trustees on February 27, 1970.

19. Skehan was sent written notification of the decision not to reappoint him by letter of May 19, 1970, written by Nossen.

20. On October 21, 1970, when Skehan went to Nossen's office to request a salary check, Nossen pounded on the table and stated that he intended to "ruin" and "destroy" Skehan.

21. In Nossen's letter of October 9, 1970 to Skehan, he stated "You were at the time the appointment was offered advised that your previous disruptive activities made your presence on this campus unwelcome, and the hope was expressed that you would not accept."

22. Soon after Skehan began teaching at Bloomsburg, he began absenting himself from Friday afternoon classes by making arrangements with the students to meet at some other time or with other colleagues to take charge of his classes.

23. Dr. Saini discussed with Dr. Skehan the fact that students had complained to him that they were having difficulty seeing Skehan about problems relating to their course work.

24. Students complained to Dr. Saini that Skehan's voice was inaudible in the classroom.

25. Without proper approval, Skehan arranged with some other faculty members to take charge of his class during an examination in May, 1969, months after he had been informed by Dr. Saini that such conduct was not permissible.

26. Skehan's criticism and disagreement with the administration, specifically Dr. Nossen and the Board of Trustees of Bloomsburg State College, concerning certain campus issues set forth above was not a motivating or substantial factor in the decision not to renew his contract of employment beyond the 1970-1971 year.

27. Skehan would not have had his contract of employment renewed beyond the 1970-71 school year even in the absence of his disagreement with and criticism of the administration concerning campus issues.

DISCUSSION.

The Defendants, Dr. Nossen and the Board of Trustees of Bloomsburg State College, have moved to dismiss Skehan's complaint insofar as it alleges a cause of action against them for failure to renew his employment contract on the ground that it is barred by the statute of limitations. The parties have stipulated that the other Defendants in this action were not involved in the decision not to renew Skehan's employment contract. Although Skehan alleges a cause of action pursuant to 42 U.S.C. § § 1981, 1983, 1985, 1985(3), only § 1983 presents a cause of action. § 1981 relates to racial discrimination con-

cerning the right to contract. § 1985 requires a conspiracy. As to this part of Skehan's claim, there is no allegation of conspiracy. Because 42 U.S.C. § 1983 does not contain its own statute of limitations, the Court is required to apply the statute of limitations which governs the most analogous claim under state law. Ammlung vs. City of Chester, 494 F.2d 811 (3d Cir. 1974). The Defendants argue that the most analogous claim under Pennsylvania law is in tort and that the two-year limitation of the Pennsylvania personal injury statute should apply. Act of June 24, 1895, P.L. 236, § 2, 12 P.S. § 34. Skehan contends that the portion of the Act of March 27, 1713, 1 S.n. L. 76 § 1, 12 P.S. § 31 which states "All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case . . . all action of debt grounded upon any lending, or contract without specialty, all actions of debt for arrearages of rent . . . should be commenced and sued within the time limitation hereafter expressed and not after; . . . within six years next after the cause of such action. . . ." governs his complaint. Ordinarily the Court would examine the allegations in Skehan's complaint to determine the most analogous cause of action existing under state law. After a careful review of Skehan's complaint, the Court is unable to find any mention of a claim that his employment contract was not renewed because of his expression of views on campus issues which disagreed with those of the administration of Bloomsburg State College. Because the Third Circuit Court of Appeals has directed this Court to make findings of fact concerning this question, the Court will attempt to discover the cause of action in state law to which it is most analogous.

Non-renewal of a contract for an improper or unlawful reason such as suppression of the expression of views protected by the First Amendment most resembles the state law claim of wrongful interference with a contract. The non-renewal of Skehan's employment contract is his underlying complaint, not injury to the person. The six-year statute of limitations of Act of March 27, 1713, 1 S.n. L. 76 § 1, 12 P.S. § 31 governs an action for wrongful interference with a contract. Loughrey vs. Landon, 381 F.Supp. 884 (E.D.Pa. 1974), See Wilson vs. Sharon Steel Corp., No. 75-2130 (3d Cir. 1/27/77); Dupree vs. Hertz Corp., 419 F.Supp. 764 (E.D. Pa. 1976).

In addition, Skehan as to this claim does not seek damages for any injury to his person. He requests that he be reinstated as a professor at Bloomsburg State College and that he be awarded damages for the economic loss he allegedly suffered as the result of the non-renewal of his employment contract. Causes of action seeking damages for economic loss are governed by the six-year statute of limitation of Act of March 27, 1713, 1 S.n. L. 76 § 1, 12 P.S. § 31. See Bulkin vs. Western Craft East Incorporated, 422 F.Supp. 437, 446 f.n. 13 (E.D. Pa. 1976).

In the light of the foregoing, the Defendants' motion for judgment on the ground that Skehan's claim is barred by the applicable statute of limitations is denied.

In order for Skehan's First Amendment rights to have been violated, the decision not to renew his contract after 1970-1971 must be based on his stance on campus issues with which the administration disagreed. Because Skehan was not tenured, as long as he was not terminated because of his involvement in protected constitutional activity, college officials could refuse to renew his contract for any reason. Ked-

die vs. Pennsylvania State University, 412 F.Supp. 1264, 1270 (M.D. Pa. 1976). There is no doubt that Skehan's comments on campus issues and his criticisms of the administration of Bloomsburg State College were protected by the First Amendment of the United States Constitution. The standard of review to be used by the lower federal courts in freedom of speech cases has been recently set forth by the Supreme Court in Mt. Healthy City School District Board of Education vs. Doyle, ... U.S. ...., 45 U.S.L.W. 4079 (January 11, 1977). In that case, a school teacher was not rehired for the next year for three reasons, one of which related to a telephone call he made to a local radio station in which he attacked a policy of the school board. The district court held that the teacher was entitled to reinstatement with back pay because the exercise of First Amendment rights played a substantial part in the decision not to renew even though other permissible grounds had been involved in the teacher's termination. The Supreme Court stated that the "difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire. It does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct but that same candidate ought not to be able by engaging in such conduct to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record simply

because the protected conduct makes the employer more certain of the correctness of its decision." Id. at 4082. Justice Rehnquist writing for an unanimous Court stated that the burden was upon the government employee to show that his conduct was constitutionally protected and that this conduct was a substantial factor or a motivating factor in the decision not to rehire him. If that burden is carried, it is then for the Defendants to show by a preponderance of the evidence that they would have reached the same decision as to the employee's renewal of employment even in the absence of the protected conduct. Id. at 4083.

Skehan has failed to show by a preponderance of the evidence that his comments concerning campus issues at Bloomsburg State College were a substantial factor in the non-renewal of his contract by either the then President of the College, Nossen, or the Board of Trustees. Skehan has presented the following evidence.

He championed the causes of greater student participation in the government and faculty control of college policy. In addition, in November and December, 1969, he strongly protested against the dismissal of Professor Porter of the Economics Department, and served as Porter's academic advisor in the matter. He was also active in the protest over the firing of Dr. Maxwell Primack and was appointed to the American Association of University Professors Committee established to investigate that incident. In November, 1969, Skehan accompanied Professor Porter when he met with Defendant Nossen to discuss Porter's dismissal. Skehan challenged Nossen's authority to criticize the manner and substance of Porter's teaching because these matters allegedly had not been the subject of a proper evaluation by the Economics Department of Bloomsburg State College. On

December 17, 1969, Skehan appeared before the Committee on Professional Affairs of the Faculty on Professor Porter's behalf and criticized the college administration for dismissing Porter in a manner which he alleged was violative of the standards of the American Association of University Professors. On the day after he testified before the Committee, Nossen called him to his office and told him that the purpose of his meeting with him was to evaluate his performance at Bloomsburg College. Nossen accused Skehan of having submitted a petition concerning Professor Porter to the college community and said that petitions were not allowed at Bloomsburg State College because they were unprofessional and childish. On October 16, 1970, Nossen told Skehan that he intended to "ruin" and "destroy" him. But this statement is not probative of any action taken by the College administration not to renew Skehan's employment contract because that decision was made in February, 1970, approximately eight months before the exchange between Nossen and Skehan occurred. In addition, the exchange between Nossen and Skehan does not indicate why Nossen wanted to "ruin" and "destroy" Skehan. The suggestion of Skehan that this was because of his criticism of college policies is speculative. Nossen's letter to Skehan of October 9, 1970 in which he stated that Skehan's previous disruptive activities made his presence on the campus unwelcome is ambiguous. It is not clear what specific activities were meant. The phrase could refer to Skehan's criticism of administration policy or it could be directed toward his refusal to meet his classes at the appointed times. Even if viewed as referring to Skehan's criticism of administration policies, that letter and the evidence mentioned above fail to establish by a preponderance of the evidence that Dr. Nossen acted to prevent the renewal of Skehan's employment contract because of his

protected speech. There is no evidence on the record to establish that the Board of Trustees based their decision not to renew Skehan's contract on his criticism of administration policies or his comments on campus issues. Skehan has shown only that after he spoke out on campus issues his contract was not renewed. No evidence establishing a relationship or nexus between the two events has been presented.

Assuming *arguendo* that Skehan has shown by a preponderance of the evidence that his protected speech was a substantial factor in the decision not to renew his employment contract, the Defendants Nossen and the Board of Trustees have established by a preponderance of the evidence that they would have reached the same decision as to his reemployment even in the absence of the protected conduct. Dr. Saini, the Chairman of the Economics Department at Bloomsburg State College, testified that soon after Skehan began teaching at Bloomsburg, he began absenting himself from Friday afternoon classes by making arrangements with the students to meet at some other time or with other colleagues to take charge of his classes. In addition, students had complained to Dr. Saini that Dr. Skehan was difficult to find to discuss problems relating to course work. From time to time there were complaints by students to Dr. Saini that Dr. Skehan was difficult to understand and inaudible. In May, 1969, months after he had been warned that such conduct was against the policy of the college, Skehan arranged without proper approval to have some other faculty members take charge of his class for one day. Skehan has not introduced any convincing evidence to dispute the testimony of Dr. Saini. Instead, Skehan contends that these dificiencies in his conduct are trivial and frivolous and in view of his positive qualities as a teacher cannot support the non-renewal of his contract of em-

ployment. It is not for this Court to determine the wisdom of the Defendants' decision not to renew Skehan's contract. Whether or not the reasons given by Dr. Saini are frivolous or outweighed by Dr. Skehan's positive value to the college community is irrelevant to the question before the Court which is whether or not Skehan's employment contract was not renewed because of his protected speech. The reasons given by Dr. Saini do not appear to the Court to be a facade to camouflage the real reason for Skehan's contract not being renewed. As long as Skehan did not lose his opportunity for continued employment because of his exercise of constitutionally protected First Amendment freedoms, he could be discharged for any reason whatsoever or no reason at all. Mt. Healthy City School District Board of Education vs. Doyle, ... U.S. ...., 45 U.S.L.W. 4079, 4082 (Jan. 11, 1977). In addition, the Defendants and the other involved administrative officials at Bloomsburg State College apparently felt that a professor's responsibility to meet his class at the appointed times was extremely important. Skehan's failure to do this was the reason that his employment contract for 1970-71 was terminated at mid-year. Skehan vs. Board of Trustees of Bloomsburg State College, 358 F.Supp. 430, 434 (M.D. Pa. 1973).

In the light of the foregoing, the Court will grant judgment in favor of the Defendants Nossen and the Board of Trustees of Bloomsburg State College as to Skehan's claim that the decision not to reappoint him after the 1970-1971 academic year was for reasons violative of the First Amendment.

CONCLUSIONS OF LAW

1. Skehan's claim that the Defendants' decision not to reappoint him after the 1970-1971 academic year violated his First Amendment rights is not barred by the applicable statute of limitations.

2. Skehan's criticism of the policies of the administration of Bloomsburg State College and his speaking out on Campus issues was protected by the First Amendment of the United States Constitution.

3. Skehan's protected speech was not a motivating or substantial factor in the decision of Defendant Nossen and the Board of Trustees of Bloomsburg State College not to renew his employment contract beyond the 1970-1971 academic year.

4. Skehan's employment contract would not have been renewed beyond the 1970-1971 academic year by Defendant Nossen and the Board of Trustees of Bloomsburg State College even if he had not engaged in criticism of the administration of Bloomsburg State College and had not spoken out on campus issues.

An appropriate order will be entered.

MUIR,
U.S. District Judge.

Dated: March 24, 1977

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

ORDER

1. The motion of Defendants Nossen and the Board of Trustees of Bloomsburg State College for judgment in their favor on Skehan's claim that the decision not to employ him after the 1970-1971 academic year was for reasons violative of the First Amendment is granted.

2. The motion of Skehan for judgment in his favor on his claim that the decision not to employ him after the 1970-1971 academic year was for reasons violative of the First Amendment is denied.

3. The Clerk of Court shall enter judgment as to Defendant Nossen and the Board of Trustees regarding Skehan's claim that the decision not to reappoint him after the 1970-1971 academic year was for reasons violative of the First Amendment.

Dated: March 24, 1977

MUIR,
U.S. District Judge.

3/24/77 Judgment

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/72
(Judge Muir)

JUDGMENT

The issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon,

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Defendants Nossen and the Board of Trustees regarding Skehan's claim that the decision not to reappoint him after the 1970-1971 academic year was for reasons violative of the First Amendment.

Dated at Williamsport, Pennsylvania, this 24th day of March, 1976.

DONALD R. BERRY,
Clerk of Court.

1/10/77 Order—Deny 1st Amend. Test Grant Immunity Test.

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
(Complaint Filed 12/22/72)
(Judge Muir)

ORDER

January 10, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS.

Skehan filed his complaint in the United States District Court for the Eastern District of Pennsylvania on October 10, 1972. On December 22, 1972, the case was transferred to this Court. On January 11 and 12, 1973, a hearing on his request for a preliminary injunction was held. On October 31, 1973, the Court declined to issue a preliminary injunction. In March, 1973, the parties agreed that no further testimony would be necessary in order for the Court to reach its final decision on the matter. On May 11, 1973, judgment in favor

of Skehan in the amount of $1.00, together with costs, was entered. On June 9, 1973, Skehan filed a notice of appeal.

On May 3, 1974, the Third Circuit Court of Appeals remanded the case to this Court for further findings with respect to three enumerated issues of fact. Skehan vs. Board of Trustees, 501 F.2d 31 (3d Cir. 1974). On July 30, 1974, the case was placed on the November, 1974 trial list. On October 11, 1974, after Skehan received an extension from Justice Brennan to November 8, 1974 to file a petition for writ of certiorari, the case was continued to the January, 1975 trial list to avoid the possibility of simultaneous proceedings in this Court and the U.S. Supreme Court. On October 31, 1974, Skehan's application for a stay of all proceedings pending the United States Supreme Court's decision on his petition for a writ of certiorari was denied because no petition for writ of certiorari had been filed by Skehan. On November 8, 1974, Skehan filed a petition for the issuance of a writ of certiorari and the case was deleted from the January, 1975 list.

On May 27, 1975, the Supreme Court granted the writ, vacated the judgment of the Court of Appeals and remanded the case to the Circuit Court. Skehan vs. Board of Trustees, 421 U.S. 983 (1975). On June 30, 1975, the Court of Appeals notified this Court of that decision and requested the record.

On June 21, 1976, the Court of Appeals filed an opinion again remanding the case to this Court for further findings with respect to two of the three factual questions which it had enumerated in its first opinion. Skehan vs. Board of Trustees, 538 F.2d 53 (3d Cir. 1976).

On July 15, 1976, promptly after the mandate was issued, the case was placed on this Court's September, 1976 trial list. On August 27, 1976, it was continued at the request of counsel for both sides to the December, 1976 trial list.

At the pre-trial conference on December 1, 1976, it became apparent that certain issues could be resolved without trial and that the remaining ones could most efficiently be handled by continuing the case until January, 1977. On January 3, 1977, the case was further continued on Skehan's motion to the March, 1977 trial list because of the sudden death of the wife of Skehan's counsel.

On remand, this Court is required, *inter alia*, to make findings of fact with respect to "whether the decision not to renew Skehan's contract after 1970-71 was based on his stance on campus issues with which the administration disagreed." 538 F.2d at 63. Currently pending is a motion by Skehan for leave to submit additional testimony with respect to that issue which will be denied.

Skehan became employed at Bloomsburg State College in January, 1969, on a contract which extended through the 1969-70 school year. In May, 1970, Skehan was notified that his contract would be renewed for the 1970-71 academic year but would not be extended any further. Skehan began teaching on the final year of his contract in September, 1970 and was fired the next month. This Court previously concluded that Skehan was fired for disregarding directives from the college administration relating to scheduling of classes and not for his stand on political issues, such as the Vietnam War. See Skehan vs. Board of Trustees of Bloomsburg State College, 353 F.Supp. 542 (M.D. Pa. 1973). The Court of Appeals, in its first opinion, noted that this Court had failed to make a finding as to the reasons for the antecedent decision by officials at Bloomsburg not to renew his contract beyond the 1970-71 academic year. See Skehan vs. Board of Trustees of Bloomsburg State College, 501 F.2d 31, 37 (3d Cir. 1974).

The Third Circuit's second opinion, Skehan vs. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (1976), dealt primarily with questions of attorney's fees as well as defenses and left its prior holding on the non-renewal issue virtually untouched.

There is no question that the non-renewal issue was before the Court in the January, 1973 hearing on Skehan's request for preliminary injunction. Counsel for both sides then agreed to allow the record developed at the preliminary injunction hearing to stand for purposes of a decision on the request for a permanent injunction. Thus, both parties rested on all issues in the case, including the non-renewal one.

The Court is of the view that Skehan had a full opportunity to present all evidence concerning the reasons which may have motivated the decision not to renew his contract. If he now considers his 1973 presentation inadequate, the burden of that deficiency rests upon him. The real thrust of his present request to take additional testimony appears to deal not so much with his case in chief on the non-renewal issue but with his opportunity to offer rebuttal evidence to any testimony proferred as a defense.

The Defendants have filed a motion for leave to take additional testimony on the issue of their "official immunity". That question was not before the Court in 1973 and, in any event, the law with respect to their defenses in this case has changed substantially in the interim. Although the Court will not permit the re-opening of Skehan's case in chief on the non-renewal issue, he is, of course, entitled to present rebuttal evidence. It is not his burden to prove that the Defendants acted maliciously or in disregard of his constitutional rights.

Rather, proof of the converse is the Defendants' burden. Consequently, there is no need to allow him to "go first" on this issue at the hearing on remand. The necessity for such a hearing is, however, predicated upon a finding by the Court that the decision not to renew Skehan's contract was for reasons which amounted to a denial of his First Amendment rights. The resolution of that question awaits a proper motion by counsel.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Skehan's motion to take additional testimony with respect to the reasons for the non-renewal of his teaching contract at Bloomsburg State College is denied.

2. The Defendants' motion to take additional testimony on the issue of "official immunity" is granted.

MUIR,
U.S. District Judge.

12/23/76—Order Deny Amend. Compl.

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644
Complaint Filed 12/22/74
(Judge Muir)

ORDER

December 23, 1976

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The Complaint in the above-captioned case was filed on December 22, 1972. One of the named Defendants is the Board of Trustees of Bloomsburg State College. The individual members of the Board were not designated as Defendants and were not served with a copy of the Complaint. The case was tried and disposed of by May, 1973. It was in the Court of Appeals and the Supreme Court until remand to this Court July 14, 1976. Upon remand it was promptly set for trial.

On December 1, 1976, almost four years after the filing of the Complaint and just prior to the scheduled December trial, since postponed to January, Skehan submitted a motion for leave to file an amended complaint, adding the individual members of the Board as Defendants. The motion became ripe for decision on December 21, 1976. It will be denied.

Skehan appears to argue that the individual Trustees are already parties to this suit and, consequently, their addition to the "List of Party Defendants" is a mere formality. Skehan's two briefs filed in support of this motion repeatedly make reference to the fact that "defendants have assumed throughout this litigation that the individual trustees were defendants." (Skehan's reply brief filed December 21, 1976, p. 7). He also contends that the Court of Appeals, which has issued two Opinions in this case, made the same assumption. Such "assumptions" are irrelevant. Parties A, B, C, and D cannot make parties W, X, Y and Z defendants to an action by "assuming" their participation. W, X, Y and Z do not become parties to an action until they are properly served pursuant to F.R.Civ.P. 4. Although the members of the Board are undoubtedly aware of the existence of this lawsuit and are prepared to testify if necessary, they have never been informed that they have been sued as individuals and are subject to personal liability. Service on them just days before the trial of the case *on remand* would be an injustice. Skehan made his decision not to name the individual trustees four years ago. In the interim, he has not undone what he apparently now considers a mistake.

The Court does not reach the question of whether the amendment is barred by the statute of limitations or the question of whether, even if the statutory period has run, the amendment could be effected under the "relation back" principles contained in F.R.Civ.P. 15(c). If the statute of limitations now precludes the assertion in an independent action with respect to any claims which he may have against the trustees, the responsibility for that circumstance rests with him and cannot be rectified by a last-minute amendment which could work great prejudice to the proposed additional defendants. The sole basis for the Court's decision is its view that justice requires that the amendment not be allowed at this stage of the proceedings. See Rule 15(a).

NOW, THEREFORE, IT IS ORDERED THAT:

Skehan's motion "For Leave to File an Amendment to the Complaint Adding the Names of Individual Members of the Board of Trustees to the List of Party Defendants" filed December 1, 1976 is denied.

MUIR,
U.S. District Judge.

No. 76-409—Certiorari Denied

No. 76-409. Board of Trustees of Bloomsburg State College *et al.*, petitioners, v. Joseph T. Skehan.

November 29, 1976. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-1613

DR. JOSEPH T. SKEHAN,

Appellant

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTENGER, SUPERINTENDENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE,

Appellees

(D.C. Civil Action No. 72-644)

Rehearing In Banc Argued May 13, 1976

Before SEITZ, *Chief Judge*, BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
(Filed June 21, 1976)

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GIBBONS, *Circuit Judge*

This case is before us on remand from the Supreme Court. In August 1972 Joseph Skehan, formerly a non-tenured Associate Professor of Economics at Bloomsburg State College in Pennsylvania, sued in the district court seeking preliminary and permanent injunctive relief of reinstatement and back pay to that position, declaratory relief that his termination from the position was unconstitutional, punitive damages and attorney's fees. The defendants in the action were Bloomsburg State College; its Board of Trustees; Dr. Robert Nossen, its President; his successor to the presidency, Dr. Charles Carlson; and John Pittenger, Pennsylvania's Superintendent of Education.

The district court found that Skehan's one year employment contract was an interest in the nature of property; that its termination without an adequate hearing violated due process; and that the termination was not, as alleged, in retaliation for engaging in activity protected by the first amendment.[1] The court did not decide whether the college's prior decision not to renew Skehan's contract,[2] which had the effect of preventing him from achieving

[1] Skehan alleged in his complaint that the college terminated him for his controversial stand on political issues, and especially for his trenchant criticism of the Vietnam War. The district court found that Skehan had been fired for disregarding directives from the college administration relating to the scheduling of classes.

[2] Skehan had been employed in January of 1969. This contract extended through the 1969-70 school year. In May 1970 Skehan was notified that his contract would be renewed for the following academic year, but would not be renewed beyond that date. Skehan resumed his teaching duties for the terminal year of his contract in September, 1970. President Nossen fired

tenure, was made in reprisal for activities protected by the first amendment. Nor did it decide whether Skehan had a contractual right to a so-called "academic freedom" hearing prior to the college's decision not to renew his appointment.[3]

On appeal we affirmed the district court's determinations that the termination of Skehan's one year contract violated due process and that the termination was not in retaliation for the exercise of first amendment rights. We concluded that the court should have considered his claim that the non-renewal decision was so motivated, and should have decided his claim to a contractual "academic freedom" hearing prior to termination. We held that the individual defendants, exercising discretionary governmental functions, were immune from suits for money damages. We instructed the district court to determine whether the college was an entity as to which Pennsylvania asserted sovereign immunity. If the college did not share the Commonwealth's immunity, the district court was instructed to consider making an award of back pay and an award of attorney's fees. Otherwise it was to deny an award of back pay or attorney's fees.[4] Skehan filed a petition for certiorari. On May 27, 1975 the Supreme Court ordered that the judgment of this court be vacated and the case be remanded to this court for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Wood v. Strickland*, 420 U.S. 308

Skehan on October 19, 1970; the dismissal was confirmed by the Board of Trustees of the college on October 23.

[3] Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 542 (M.D. Pa. 1973).

[4] Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974).

(1975).[5] We decided to review the case in banc, and requested supplemental briefing. We now turn to a consideration of our prior decision in light of the Supreme Court's mandate.

I. *Alyeska Pipeline Service Co. v. Wilderness Society*

We previously held that Skehan, as a private attorney general vindicating a public interest in having state-related institutions act in compliance with the fourteenth amendment, was entitled to an award of attorney's fees from Bloomsburg State College provided the college did not share the sovereign immunity of the Commonwealth of Pennsylvania.[5a] *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* overrules the cases on which we relied and which recognized that basis for the award of attorney's fees. It holds that absent (1) a contract or statute granting a right to attorney's fees; (2) the conferring of a common benefit by the recovery of a fund or property; (3) willful disobedience of a court order; or (4) a finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons, federal courts must apply the American rule requiring each party to pay from his own pocket for the services of his attorney. Skehan points to no statute which would justify an award of attorney's fees,[6] but he urges that because primary emphasis was

[5] Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975).

[5a] In Part III of this opinion we hold that Bloomsburg State College does enjoy the Commonwealth's immunity.

[6] Skehan brings this action under the Civil Rights Act, 42 U.S.C. §1983, and admits in his brief that this section does not allow for the recovery of attorney's fees. *See* Brief for Plaintiff-Appellant on Remand from the Supreme Court at 10.

piaced on the now-discredited but once-respectable private attorney general theory, we should still remand for appropriate findings by the district court on both the common benefit and bad faith exceptions to the American rule.

The common benefit theory will not avail Skehan in this case. While it is true that the public at large benefits from making public institutions act in accordance with the demands of due process, Skehan is not attempting to assess against those benefited members a fair share of the reasonable value of the attorney's services which created the benefit. *Compare Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 163 (3d Cir. 1973); *Merola v. Atlantic Richfield Co.,* 493 F.2d 292 (3d Cir. 1974); *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (3d Cir. 1974); *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir. 1975). Instead, he is attempting to charge the losing party for the reasonable value of attorney's fees which conferred that intangible benefit on an unascertainable class not within the court's jurisdiction. In *Hall v. Cole,* 412 U.S. 1 (1973), the Court applied the common benefit theory to justify a fee award for conferring a common but intangible benefit—the protection of first amendment rights. But there the Court could assess the fee against a union treasury, and thus shift the cost of litigation to an ascertainable class of union members who had been benefited. Skehan would have us analogize a union treasury to the treasury of the college. But the analogy between union dues in a union treasury and public funds in the college treasury is remote at best. Moreover, in *Hall v. Cole* it was quite clear

who were the beneficiaries of increased union democracy and fairer operation of the union. In this case there would be no way of telling whether, if attorney's fees were assessed against the college, the cost would ultimately be borne by those parts of the college's several constituencies —students, faculty, and the tax-paying public—which actually benefited. We share Judge Wright's view that to apply the common benefit theory to assess attorney's fees against a losing party "would . . . stretch it totally outside its basic rationale. . . ." *Wilderness Society v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (en banc), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society, supra.* To hold that we could charge the college for a common benefit to an undefined public would be to apply in other words the private attorney general theory which the *Alyeska* Court proscribed. And the inapplicability of the common benefit theory to an assessment of attorney's fees against the individual defendants is even more obvious. Thus we conclude that a remand for findings with respect to this theory is not appropriate.

Skehan also urges that on remand he would be able to show that all of the defendants, but in particular, President Nossen, acted in bad faith, vexatiously, wantonly, or for oppressive reasons, states of mind which Skehan contends permit an award of attorney's fees under the American rule. The particular reference to Nossen, a prime mover in his termination but hardly a prime mover in carrying on this litigation, suggests the need for distinguishing between the bad faith which may have led to the termination of employment with bad faith, vexatiousness or oppression in litigating. It is the latter which comprises the predicate for the well-recognized fourth exception to the American rule on fee awards. The fee is awarded in the nature

of costs for vexatiousiv bringing or maintaining an unfounded action or defense.[7] 6 J. Moore, Federal Practice ¶54.77[2], at 1079 (2d ed. 1974). It can hardly be said that on those issues on which the defendants have thus far prevailed the defense has been maintained in bad faith, vexatiously, wantonly or for oppressive reasons. Nor can we find evidence of oppressiveness in the defendants' response on appeal to those issues on which Skehan has been successful. On the other hand, since we are remanding and we cannot predict the future course of this litigation, we cannot foreclose consideration of the award of attorney's fees as costs based upon any lack of good faith in maintaining the litigation in the future.

Skehan, relying on *Vaughan v. Atkinson*, 365 U.S. 527, 530-31 (1962), urges that there is a fifth exception to the American rule, which allows the recovery of fees as an element of damages for pre-litigation vexation or oppression in resisting a just claim. In *Vaughan v. Atkinson*,

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[7] The Judiciary Act of 1789, 1 Stat. 73, gave federal courts discretionary authority to tax in favor of one party and against another expenses occasioned by delay in litigation. Section 22, governing the writ of error in civil actions, provided in part:

> "And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

1 Stat. 85.

Section 23 provided:

> "[A]nd whereupon such writ of error the Supreme Court or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for delay, and single or double costs at their discretion."

Id. Cf. The Perseverance, 3 U.S. [3 Dall.] 336 (1797).

a suit in admiralty for maintenance and cure and for injury from the withholding of maintenance and cure when it was due, the seaman could show no injury caused by the withholding of the payments other than the cost of attorney's fees in the suit. The Fourth Circuit, applying the American rule, refused to award fees as an item of compensatory damages.[8] The Supreme Court, with seven Justices participating and two dissenting, held that attorney's fees could be recovered as damages suffered for failure to pay maintenance. Authority for this departure from the American rule was found in *The Appollon*, 22 U.S. [9 Wheat.] 362 (1824), an admiralty suit for the recovery of damages for the illegal seizure of a vessel. Justice Story wrote:

> It is the common course of admiralty, to allow expenses in this nature [cousel fees], either in the shape of damages, or as part of the costs. 22 U.S. [9 Wheat.] at 379.

Vaughan v. Atkinson has frequently been cited in non-admiralty contexts. Since the ringing reaffirmation of the American rule in *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* its authority in non-admiralty contexts is not entirely clear. We can glean something of the Court's attitude perhaps from the reference to the case in *F. D. Rich Co. v. Industrial Co.*, 417 U.S. 116, 129 n. 17 (1974). There the text reads "We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .", and the footnote cites *Vaughan v. Atkinson,* but also three circuit court

[8] Vaughan v. Atkinson, 291 F.2d 813, 815 (4th Cir. 1961).

non-admiralty cases[9] in which attorney's fees were awarded for pre-litigation obduracy or oppression in equitable actions. *Alyeska,* in turn, cites the *F. D. Rich Co.* reference to *Vaughan v. Atkinson* with approvel. 421 U.S. at 259. It would seem, then, that the *Vaughan v. Atkinson* exception to the American rule is not restricted to admiralty cases and survives *Alyeska. See Bond v. Stanton,* 528 F.2d 688 (7th Cir. 1976), *cert. granted,* 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1413); *Thonen v. Jenkins,* 517 F.2d 3, 6 (4th Cir. 1975); *Handler v. San Jacinto Junior College,* 519 F.2d 273, 280 (5th Cir. 1975); *Class v. Norton,* 505 F.2d 123, 127 (2d Cir. 1974); *Taylor v. Perini,* 503 F.2d 899, 904 (6th Cir. 1974), *vacated on other grounds,* 421 U.S. 982 (1975); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 689 (1974); Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875, 1882 (1975) (citing *Hall v. Cole,* 415 U.S. 1, 15 (1973)). *Compare Potter v. Gardner,* 30 U.S. [5 Pet.] 718, 725-27 (1831) (Baldwin, J., dissenting). Whether the facts of this case warrant its application against any of the defendants is a matter on which the district court should pass in the first instance.

One issue tendered to the Supreme Court by Skehan's petition for certiorari was whether the Commonwealth may be required to pay attorney's fees as part of an order granting prospective relief for violation of the fourteenth

[9] McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); McEnteggart v. Cataldo, is particularly significant since it involved the award of attorney's fees to a dismissed college teacher suing to obtain a statement of reasons for his dismissal.

amendment.[10] The Court in the *Alveska Pipeline* case did not purport to decide the question, *see* 421 U.S. at 269-70 n. 44, and found it unnecessary to do so in its summary disposition of Skehan's petition for certiorari.

In our prior opinion we concluded that *Edelman v. Jordan*, 415 U.S. 651 (1974), precluded a private attorney general fee award against the college if under Pennsylvania law it was a state agency for which the Commonwealth claimed sovereign immunity. 501 F.2d at 42. In that opinion we were not dealing with a fee award against the Commonwealth for obduracy in carrying forward the defense of a weak case, an issue which, as we said above, may arise in the future course of this litigation. Although the issue is not free from doubt, it seems likely that since such an award is considered to be an award of costs, it would be governed by the established rule that state sovereign immunity is no bar to an award of costs. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927). A number of courts of appeals have allowed awards of attorney's fees against instrumentalities of the state on this ground. *See, e.g., Thonen v. Jenkins, supra*, 517 F.2d at 7; *Souza v. Travisono*, 512 F.2d 1137 (1st Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); *see also Gates v. Collier*, 522 F.2d 81 (5th Cir. 1975) (en banc) (per curiam), *on remand*, 44 U.S.L.W. 2405 (N.D. Miss. Feb. 3, 1976); *Taylor v. Perini, supra* (Edwards J., dissenting). Since the obduracy ground for a fee award may still arise in this case, we hold that attorney's fees may be awarded as costs against a sovereign otherwise immune, if it pursues

[10] *See* Petitioner's Brief for Certiorari at 2, Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975); 43 U.S.L.W. 3366 (U.S. Nov. 8, 1974) (No. 74-558).

a bad faith, vexatious, wanton or oppressive course of litigation, but may not be awarded against an immune sovereign as damages because of pre-litigation obduracy on the authority of *Vaughan v. Atkinson, supra*.[11] We call to the district court's attention, however, that the issue of attorney's fee awards against a state is pending on certiorari in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251). The opinion in that case, when it is decided, may require a decision at variance with our holding.[12]

[11] We held in our prior opinion in this case that *Edelman v. Jordan* had tacitly overruled the summary affirmance in Amos v. Sims, 409 U.S. 942 (1972), of a fee award to be paid out of a state treasury. *See* 501 F.2d at 42-43, n. 7; *see also Alyeska Pipeline Service Co. v. Wilderness Soc'y., supra*, 421 U.S. at 270-71, n. 46. The district court award in that case had been predicated upon both the private attorney general theory and the obduracy exception to the American rule. *See* Sims v. Amos, 340 F. Supp. 691, 693-95 (M.D. Ala. 1972) (per curiam). It may therefore be argued that in view of this court's interpretation of *Edelman v. Jordan*, the theory of recovery upon which we remand this case to the district court is now foreclosed. In our previous opinion, however, the only question before us involved the effect of *Edelman v. Jordan* upon the private attorney general theory of recovery of attorney's fees from the state. We had no occasion to consider the impact of *Edelman v. Jordan* upon the aspect of *Amos v. Sims* recurring in this case—whether a fee award may be assessed as costs against a state that has vexatiously prolonged the course of litigation.

[12] *Fitzpatrick* followed a prior Second Circuit decision, Class v. Norton, 505 F.2d 123, 126-27 (2d Cir. 1970), which permitted fee awards against the state. The court held that such an award was not barred by *Edelman v. Jordan* where it was a "necessary results of attempts to gain compliance with a decree which by its terms was prospective in nature" and had but an ancillary effect on the state treasury. *See also Souza v. Travisono, supra*. The

Summarizing, the theory upon which we suggested that the district court could award attorney's fees—the private attorney general theory—has been foreclosed by *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* and the obduracy ground was not previously considered. We therefore remand this aspect of the case to the district court for additional findings on the obduracy issues.

II. *Wood v. Strickland*

Skehan's petition for certiorari also tendered to the Supreme Court the question whether we applied a proper standard in determining that the individual defendants were immune from civil damage actions because of official immunity.[13] The mandate on remand directs us to reconsider that determination in light of *Wood v. Strickland, supra.* Upon such consideration we conclude that *Wood v. Strickland* significantly modified the law of immunity upon which we relied in affirming the district court, and that a remand for additional findings of fact is now required.

In our prior opinion we assumed that the Supreme Court had thus far interpreted 42 U.S.C. §1983 as having left intact the existing common law respecting immunity from damage claims for actions arising out of the performance of duty of legislators, *Tenny v. Brandhove,* 341 U.S. 367 (1951), judges, *Pierson v. Ray,* 386 U.S. 547, 554 (1967), and government officials. *See Bauers v. Heisel,*

court did not attempt to justify the fee award as an element of costs, so it is conceivable that the Supreme Court will decide the case on narrower grounds than are encompassed by this proceeding.

[13] Petitioner's Brief for certiorari, *supra,* note 10, at 2; 43 U.S.L.W. 3366.

361 F.2d 581 (3d Cir. 1966) (en banc); *Fidtler v. Rundle,* 497 F.2d 794, 797-98 (3d Cir. 1974). We also assumed that federal law determines the scope of any such immunity when the defendant is charged with a federal statutory or constitutional wrong. *Fidtler v. Rundle, supra,* at 798-800. We recognized that not all government officials are at common law covered by official immunity. We held that whether or not a particular official enjoyed immunity for his conduct depended upon whether the action complained of was performed in the discharge of a discretionary governmental function. We also held that all defendants' actions of which Skehan complained occurred in the exercise of discretionary governmental functions. It was our view that if the governmental officials performing discretionary government duties acted within the scope of their official responsibilities, they were immune from damage actions although they were charged with having acted mistakenly or even maliciously. The theory justifying immunity from damage claims, we thought, was that the public interest in the unfettered exercise of discretionary duties such as legislating, adjudicating, rule-making or budgeting was so paramount that it should be performed free of the fear that either the motivation of the responsible officials or the correctness of their decisions could later be called into question in a suit for damages.

We recognized that not all government officials enjoyed such an unqualified immunity, and that some governmental officials were immune when performing certain duties but not immune when performing others. In this case the acts complained of resulted in Skehan's discharge during the term of his contract. Each defendant acted within the scope of his official statutory authority, and the decision to terminate Skehan's employment was in essence ad-

judicatory. In making the adjudication the defendants committed a procedural legal error of constitutional dimensions. But we believed that neither that error nor their motivation could be called into question in damage actions because governmental officials entrusted with adjudicatory responsibilities enjoyed, when discharging such duties, and unqualified immunity. *See Spalding v. Vilas,* 161 U.S. 483 (1896); *Barr v. Matteo,* 360 U.S. 564 (1959).

We did not believe that *Scheuer v. Rhodes,* 416 U.S. 232 (1974), had overruled what we thought was a settled principle that the immunity of some governmental officials, and specifically nonjudicial government officials performing adjudicatory functions, was unqualified. It was our impression that *Scheuer v. Rhodes* recognized a qualified immunity for governmental officials generally. Even governmental officials not performing discretionary duties such as legislating, adjudicating, rule-making or budgeting were immune if they acted within the scope of their official responsibilities in good faith and with probable cause. We perceived the purpose of the remand in *Scheuer v. Rhodes* to be two-fold. First, the Court needed a record to determine the nature of the duties being performed by each of the defendants. Second, if those duties were not such as would cloak a given defendant with an unqualified immunity, the Court needed a record to determine whether the defendant acted within the scope of his official responsibility in good faith and with probable cause.

Wood v. Strickland, supra, demonstrates that we erred in assuming that there still existed an unqualified, common law immunity covering nonjudicial state government officials performing adjudicatory functions. The question before the Court was the immunity of school board members

for a disciplinary suspension. The defendants had the official responsibility for making the adjudication, and they made a procedural error of constitutional dimensions. The Court held:

> "[I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. 420 U.S. at 322.

Functionally, the school board members adjudicating a student discharge and the state college officials adjudicating a faculty termination are identically situated. In the light of *Wood v. Strickland*, supra, we must now recognize that what we thought was an unqualified privilege is in truth something less broad. While we can determine on the present record that the defendants were performing nonjudicial adjudicatory functions within the scope of their official responsibilities, we cannot determine that they met the *Wood v. Strickland* test.

The defendants urge that the district court finding, referred to in our prior opinion, 501 F.2d at 43 n.8, that the constitutional deprivation was technical in nature and not the product of bad faith, suffices to establish a qualified immunity. We reject this contention because at best the finding would satisfy only one of the two conditions of immunity established by *Wood v. Strickland.* A nonjudicial adjudicating official must act without malice. But the inquiry does not end there. He can be held liable for dam-

ages if he knew or reasonably should have known that the action he took would violate the constitutional rights of the party affected. There was no finding with respect to the defendants' knowledge or the reasonableness of their belief in the legal necessity for a pre-termination hearing. Moreover, in our prior review, since we assumed that we were dealing with an unqualified privilege, we had no occasion to pass upon the strength of the evidence supporting the district court's finding of good faith. Finally, since the Supreme Court has announced what we consider to be a departure from the settled prior law on governmental immunity in this circuit, we deem it appropriate that the district court be given an opportunity to reconsider both qualifications to the defendants' immunity.

Several questions not addressed by the Supreme Court in *Wood v. Strickland* will of necessity arise on remand in this case. These include which side has the burden of going forward with evidence and which side has the burden of proof on the two qualifications to the defendants' immunity. We find guidance on these issues in the Court's opinion in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), *vacating and remanding* 493 F.2d 507 (5th Cir. 1974). There the Court tacitly approved in part a charge submitting to the jury the issue of a governmental official's immunity.[14] The Court held that the jury was improperly instructed with respect to petitioner O'Connor's reasonable belief in the constitutionality of his actions,[15] but implied that the malice instruction was correct. The charge on

[14] This charge applied both to the common law defense of good faith raised by O'Connor and to the question of official immunity. *See* 493 F.2d at 527, 530 & n. 57.

[15] This error induced the Court to vacate the judgment and remand for reconsideration in light of *Wood v. Strickland*.

malice is set forth in full in Judge Wisdom's opinion for the Fifth Circuit, 493 F.2d at 527. The issue was submitted to the jury not as an element of the plaintiff's case, but as a defense which O'Connor, the official, had by a preponderance of the evidence the burden of sustaining. Although *O'Connor v. Donaldson* is not definitive, it suggests that the qualifications to immunity announced in *Wood v. Strickland* are matters of defense. *See* 422 U.S. at 576-77; *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Bryan v. Jones*, 44 U.S.L.W. 2521 (5th Cir. Apr. 30, 1976) (en banc).

Following the remand in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which the Court did not reach the issue of official immunity, the Second Circuit held that federal police officers were not immune from suit, but had a defense, on which they would have the burden of proof, that they acted with probable cause, or in good faith and with a reasonable belief in the legality of their actions. *See* 456 F.2d 1339, 1347-48 (2d Cir. 1972). In *Safeguard Mutual Insurance Co. v. Miller*, 472 F.2d 732 (3d Cir. 1973), this court adopted the same approach, holding that since good faith was a matter of defense it could not be determined on a Rule 12(b)(6) motion. *Accord, Fidtler v. Rundle*, 497 F.2d 794 (3d Cir. 1974). *Wood v. Strickland* and *O'Connor v. Donaldson* appear not to have made any change in the law in this respect. We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of *Wood v. Strickland*, official immunity should attach. On remand the district court must determine whether the defendants met their burden of establishing (1) that they

did not know and reasonably need not have known that depriving Skehan of a pretermination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause him to suffer other injury. Whether those determinations can be made on the present record, or can be made in a motion for summary judgment under Rule 56, Fed. R. Civ. P., are questions we leave to the district court in the first instance. *See Economou v. United States Department of Agriculture*, No. 75-6050, at 3410 (2d Cir. Apr. 23, 1976).

While we can give guidance to the district court as to where various burdens lie on the *Wood v. Strickland* qualifications, we are less confident of our ability to suggest by what criteria the reasonableness of the several defendants' lack of knowledge of due process requirements should be measured. The district court will be required to inquire into the status and responsibility of each individual defendant and to determine whether, for example, a trustee should be held responsible for the same level of knowledge of constitutional rights as a college president or a commissioner of education. The determination may turn on the relative availability to each defendant of counsel, as well as the relative certainty of the legal issue, a criterion to which the *Wood v. Strickland* Court expressly adverted. 420 U.S. at 322. The federal courts will be entering largely unchartered waters here, for the pre-existing rule of unqualified official immunity meant that very little if any case law was developed with respect to standards of liability for negligent mistakes of law by persons making nonjudicial adjudications. *Cf. Paton v. LaPrade*, 524 F.2d 862, 872-73 (3d Cir. 1975).

O'Connor v. Donaldson describes *Wood v. Strickland* as a "decision on the scope of the qualified immunity possessed by state officials . . . ." 422 U.S. at 577. Since that decision, however, the Court clarified the picture by its holding in *Imbler v. Pachtman*, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976), that the common law unqualified immunity of judicial officers remains undisturbed. Thus *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), which overruled *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), still governs with respect to judicial officers. But non-judicial, executive branch state officials can be sued for damages and must, if a violation of constitutional rights is found, defend on the grounds announced in *Wood v. Strickland*.[16]

III. *The Status of Bloomsburg State College*

In our earlier opinion we directed the district court on remand to determine the governmental status of Bloomsburg State College. 501 F.2d at 43, 45. Between the date of argument in this court and the date our opinion was filed, the Pennsylvania Commonwealth Court decided *Brungard v. Hartman*, 12 Pa. Commw. 477, 315 A.2d 913 (1974), which holds that state colleges such as Bloomsburg State College are agencies of the Commonwealth for which it claims sovereign immunity. That case was not called to our attention before our opinion was filed. It appears dispositive of the sovereign immunity issue. Thus it is clear in a case of this type that a back pay award cannot be made out of the college treasury, and that an award of attorney's fees against the college can only be made as costs for obduracy in this litigation.

[16] Whether an executive branch official enjoys judicial immunity will of course be determined by the nature of his functions, and not by the label that is attached to them.

IV. *Conclusion*

Our prior judgment will be vacated. The judgment of the district court will be vacated and the case will be remanded for findings of fact:

1. As to the nature of the interest created under Pennsylvania law by article 5 (e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College:[17]

2. As to whether the decision not to renew Skehan's contract after 1970-71 was based on his stands on campus issues with which the administration disagreed.

If Skehan's only contract right expired by its terms at the end of the 1970-71 academic year, and there was no first amendment violation, a back pay award against the individual defendants, covering the 1970-71 period, must be considered. The court should then make findings of fact with respect to the immunity of each defendant in conformance with this opinion. If either the article 5 (e) claim or the first amendment claim should be decided in Skehan's favor, the court should consider the award of back pay to date against the individual defendants, and also prospective reinstatement (as to which there is no immunity problem), at least until appropriate college termination procedures have taken place. We also call the district court's attention to the Supreme Court's recent decision in *Bishop v. Wood*, 44 U.S.L.W. 4820 (U.S. June 10, 1976), a decision considering or perhaps reconsidering the scope of the protection afforded public employment by the due process clause. We leave it to the district court in

[17] *See* 501 F.2d at 45.

the first instance to decide whether or to what extent that decision bears upon this litigation. We also instruct the district court to consider whether an award of attorney's fees would be appropriate against any of the individual defendants for bad faith, vexatious, wanton or oppressive conduct both prior to and during the course of this litigation, and against the college for such conduct subsequent to the commencement of the litigation.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 27, 1975

Bruce J. Terris, Esq.
1908 Sunderland Place, N.W.
Washington, D.C. 20036

Re: Skehan v. Board of Trustees of Bloomsburg State College, et al., 74-558

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. — (1975), and *Wood v. Strickland*, 420 U.S. 308 (1975). Mr. Justice Douglas took no part in the consideration or decision of this case.

Encl.—cc opins.
mentioned.

Very truly yours,
Michael Rodak, Jr., *Clerk*
By
Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

J. Justin Blewitt, Jr., Esq.
Deputy Attorney General of Pennsylvania
Dept. of Justice
Capitol Annex Bldg.
Harrisburg, Pa. 17120

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1613

DR. JOSEPH T. SKEHAN,
Appellant,
v.
BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTINGER, SUPERINTENDENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE,
Appellees.

(D.C. Civil Action No. 72-644)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued January 25, 1974
Before BIGGS, GIBBONS and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed May 3, 1974)

GIBBONS, *Circuit Judge*

Plaintiff appellant, Joseph Skehan, a doctor of economics, seeks redress for his midcontract dismissal without a hearing as a nontenured college professor at Bloomsburg State College. The defendant-appellees are Bloomsburg State College, its Board of Trustees, Dr. Robert Nossen, its President at the time of Skehan's dismissal, Dr. Charles Carlson, its current acting President, and John Pittinger, Superintendent of Education of the Commonwealth of Pennsylvania. Although the College is joined as a defendant, and has a Board of Trustees responsible for its management, Pa. Stat. Ann. tit. 71, § 62, tit. 24, § 20-2008.2, it is not a separately chartered corporation, as in the case of many universities, but a subdivision of the Commonwealth Department of Education, Pa. Stat. Ann. tit. 24, §§ 20-2002(7), 20-2003.1. All the individual defendants are state officers. Skehan was employed as Associate Professor of Economics in January 1969 under a contract extending through the academic year 1969-70. In May of 1970 he received a letter from Nossen offering him a contract for the 1970-71 school year, but indicating that

he would be required to acknowledge in writing notice that this would be a terminal year contract. He accepted the offer of employment for the 1970-71 academic year, but protested that the nonrenewal decision had been made without affording him the procedures due him before a nonrenewal decision could be made. In that protest he invoked article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College, which provides:

> "If a faculty member's service to the College is to be terminated during the first two years of the probationary [pretenure] period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of infringement of academic freedom. If a faculty member of professional rank, on probationary employment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegations shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in #9 of this document will be followed."

Article #9 outlines the notice, hearing and appeal procedures applicable to the dismissal of tenured faculty members. Thus Skehan's position in May 1970 was that the nonrenewal decision reflected in the terminal year notice was caused by considerations violative of academic freedom and that he was entitled to the hearing procedures referred to in article 5(e). Nossen replied on June 1, 1970:

> "I cannot accept your letter of May 29, 1970 as an acceptance of your position for the coming academic year. . . .

If you do not sign the offer of reappointment sent you [with the acknowledgment of notice that it was a terminal year contract], you may consider yourself terminated for the coming academic year. . . .

This is my final letter on this matter."

Skehan protested to the Board of Trustees that Nossen was violating the Statement of Policy for Continuous Employment and Academic Freedom. On June 15, 1970 Nossen wrote Skehan:

"Your appeal to the Board of Trustees, bypassing this office and other avenues of College governance, was reviewed at the Board of Trustees meeting on June 12, 1970. The Board has requested that I advise you as follows.

• • • •

The Board restates its firm and inviolable position of nonrenewal past the 1970-1971 academic year. In doing so, it reaffirms its position that the offer to you reflects simply its wish to conform fully with accepted notice procedures. The offer is neither a statement of confidence in you nor a wish that you remain during this period. On the contrary, the Board has expressed every hope that you will find it both personally and professionally advantageous to offer your resignation at this time.

• • • •

The College has prepared a contract form which is applicable to all persons offered appointment. Your refusal, to this point, to return the contract in accord with their prescribed procedures continues to indicate to them your disregard for College procedures. Nevertheless, in view of the original intention to provide due notice, they will accept the alternative letter as an indication of your acceptance of the 1970-1971 appointment as terminal.

I must, however, in all honesty and fairness, join with the Board of Trustees in the hope that you will reject the appointment."

Thus the College administration in effect rejected Skehan's request for an article 5(e) hearing on the reasons for the terminal year decision, but rehired him for the academic year 1970-71. Skehan entered into the performance of his academic duties in September. How he performed them is a matter of dispute between him and the defendants.[1] On October 9, 1970 Nossen wrote Skehan:

"You have continued, after repeated warnings from your Chairman, your Dean, the Academic Vice President, and from this office to fail to fulfill your classroom obligations as assigned, according to the procedures in effect at this college. Further, you have flagrantly, wilfully, and maliciously disrupted the instructional program. Upon the recommendation, therefore, of appropriate administrative officers, I am, effective immediately, relieving you of all classroom responsibilities, pending a final hearing.

I hardly need remind you that you are, during this current year, on terminal appointment. You were, at the time that appointment was offered, advised that your previous disruptive activities made your presence on this campus unwelcome, and the hope was expressed that you would not accept. You chose to complete this year, and at the same time you were aware that the offer went well beyond

[1] It is common ground that there was a dispute between Skehan and other members of the economics department and the College administration over whether the department or the administration controlled class scheduling. Skehan contends this dispute provided a subterfuge for his termination because of Nossen's hostility over his previous exercise of first amendment rights. The defendants contend Skehan's intransigence in the scheduling dispute caused intolerable disruption.

the minimum time necessary for notice, according to the policies of the Trustees; this was done in consideration of the difficulty you would probably have in finding an appointment in mid year. Despite this, you have failed to cooperate, to fulfill your responsibilities as a classroom instructor, and you have made it impossible for others to meet their assigned responsibilities. Your conduct, therefore, has been reprehensible, unbecoming a member of the profession, and inimical to the welfare of this college.

Should you violate the provisions of this notice and attempt to disrupt any authorized lecture or classroom of this college, full and immediate action will be taken. In the interim, I expect to receive from you, within five days, a full and a complete accountability of your actions on this campus since the start of this semester. Your salary will be continued until a final determination is made."

Although this letter demanded from Skehan within five days, "a complete accountability of your actions on this campus since the start of this semester," it was not received by him until October 12, 1970. On October 14 Skehan replied that the suspension had not been preceded by the procedures called for in the College policy. On October 19, 1970 Nossen wrote Skehan:

"Once again you have willfully and flagrantly failed to respond to my directive: this time an accountability requested on October 9, 1970. You were given five (5) days in which to make your response detailing your professional actions since the start of this semester.

You have failed to comply and I have no alternative but to remove you from the payroll effective October 17, 1970 subject to final approval by the Board of Trustees."

Skehan promptly wrote to the Board requesting a hearing. On October 24, 1970 Nossen wrote Skehan:

"The Board of Trustees, at its regularly scheduled meeting on October 23, 1970, confirmed prior dismissal action taken by this office; you are, therefore, fully and finally terminated at this College effective October 17, 1970."

Skehan went off the College payroll as of October 17, 1970. On December 1, 1970 the Committee on Academic Affairs convened to hold a hearing concerning Skehan's dismissal. He appeared but declined to participate. On the basis of correspondence and records submitted by the administration the Committee approved the dismissal action.

The defendants do not now dispute that Skehan had a contract of employment for the 1970-71 academic year. Skehan contends, but the defendants dispute, that he made a contract right to a hearing, pursuant to article 5(e), with respect to the reasons for the terminal year decision, which had the effect of depriving him of the opportunity for tenured faculty status after three years. The parties agree that the contract for the academic year 1970-71 was such as, under *Perry* v. *Sindermann*, 408 U.S. 593 (1971), gave Skehan a property interest which could not be terminated without a due process hearing. The defendants contend, but Skehan disputes, that the December 1, 1970 meeting satisfied the requirements of *Perry* v. *Sindermann*, *supra*. The report of the hearing committee on the December 1, 1970 hearing discloses that it dealt only with the October 17, 1970 dismissal, and not with the May 1970 demand for an article 5(e) hearing on the reasons for the terminal year decision. Finally Skehan contends, but the defendants dispute, that both the terminal year decision and his discharge were motivated by the administration's dislike of his exercise of first amendment rights. Violations of these rights, Skehan contends, entitle him to relief despite the limitation of any property interest in his

contract. *See Perry* v. *Sindermann, supra* at 598; *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

Skehan filed his complaint in the district court in August 1972, seeking preliminary and permanent injunctive relief of reinstatement and backpay, declaratory relief that his dismissal violated the Constitution, punitive damages, and attorneys fees. A preliminary injunction was denied on January 31, 1973. *Skehan* v. *Board of Trustees of Bloomsburg College*, 353 F. Supp. 542 (M.D. Pa. 1973). Subsequently the parties stipulated that a final hearing could be held on the record developed at the hearing on the preliminary injunction. The district court filed its opinion on May 9, 1973, 358 F. Supp. 430, and a final judgment "that the Plaintiff recover of the Defendants the sum of one dollar ($1.00) together with costs." Timely motions to amend the judgment to award more than nominal damages and to assess counsel fees were denied. This appeal followed.

The district court found:

(1) that Skehan had a contract of employment for the 1970-71 academic year which was a property interest within the meaning of *Perry* v. *Sindermann, supra*, and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972);

(2) that the December 1, 1970 hearing before the Committee on Academic Affairs, held a month and a half after termination, did not fulfill the constitutional due process requirements for the termination of his property right in the 1970-71 contract;

(3) that Skehan was discharged because of his refusal to follow directives of the administration with respect to scheduling disputes, and not for the prior exercise of his first amendment rights.

The district court made no finding:

(1) as to whether Skehan had a contractual right to an article 5(e) hearing to determine the reason for the terminal year decision; or

(2) as to whether the terminal year decision was made in retaliation for his exercise of first amendment rights.

In considering the remedy for the due process violation which it found, the district court concluded that it would not be appropriate to order reinstatement and backpay, either to the end of the 1970-71 academic year or to the date of a hearing. The Court reasoned:

> "While Plaintiff was deprived of his constitutional right to a hearing prior to dismissal, the deprivation was technical in nature. By such a classification I do not wish to demean a state employee's right to procedural due process. However, the circumstances surrounding this particular case indicate that had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Plaintiff's discharge was based upon facts rationally determined and for reasons unrelated to Plaintiff's exercise of constitutional rights. The Plaintiff has not proven any actual damages arising from Defendant's failure to give him a hearing. However, nominal damages are proven by proof of a deprivation of a right to which the Plaintiff is entitled. . . ." 358 F. Supp. at 436.

We reverse and remand for further proceedings.

I. Governing Legal Principles

In *Board of Regents* v. *Roth, supra*, and *Perry* v. *Sindermann, supra*, the Supreme Court considered the various Constitutional rights which might be affected by the dismissal of a college teacher, and the source of those

rights. It recognized a dichotomy between employment rights of property based upon a contract between the institution and the teacher, the source of which is the state law of contracts, and rights of liberty based upon provisions of the federal constitution such as the first amendment. As to property rights the appropriate analysis is to determine, under applicable state law, the nature and extent of the contract right and, if the contract right has been terminated other than by expiration of its term, to consider whether the method of termination comported with fourteenth amendment procedural due process. If a procedural due process violation has occurred, the court proceeds to fashion a remedy. With rights of liberty, such as the right of a faculty member to be free from disability imposed for engaging in speech protected by the first amendment, the analysis starts with an inquiry into the substantive reasons for whatever action is complained of. If it is found that either termination or nonrenewal was because of the exercise of protected speech (as an example), the procedural due process of the decision is irrelevant because the substantive decision is illegal as a matter of federal constitutional law. If such a substantive violation of a right of liberty has occurred, the court proceeds to fashion a remedy which, depending on the circumstances, may be the same as or different from the remedy for a procedural due process violation in the property context.

II. The Property-Procedural Due Process Claim

As we pointed out above, the defendants do not dispute that Skehan's contract for the academic year 1970-71 gave him such a state law property interest as required procedural due process for termination. They urge, however, that the district court erred in concluding that the December 1, 1970 hearing did not suffice. If we were to accept that position, there would be no occasion

to reach Skehan's claim that the district court remedy was inadequate. But there is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cutoff from the payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing official to defer to the administration's decision. We agree with the district court, therefore, that a hearing after the fact is not the due process equivalent of the pretermination hearing required by *Perry* v. *Sindermann*, *supra*. *See* 358 F.Supp. at 434-35. The termination of Skehan's 1970-71 contract violated procedural due process.

Skehan presented another contractual claim upon which the district court made no finding—that under article 5(e) he was entitled to a hearing on the reasons for the decision to make the 1970-71 contract his terminal year. The court did make a finding that the October 17, 1970 termination was not the result of Skehan's earlier constitutionally protected speech.[2] This finding does not dispose of the claim that the terminal year decision was made for reasons prohibited by principles of academic freedom. Within the meaning of the Statement of Policy for Continuous Employment and Academic Freedom, academic freedom may have a meaning broader than, the equivalent of, or narrower than the protection afforded by the first amendment. That meaning must be determined under Pennsylvania law. It must also be determined whether, as a matter of interpretation, article

[2] *See* page 13 *infra*.

5(e) confers a contractual right or is solely a matter of administrative grace, or is a noncontractual administrative procedure designed to avoid the possibility of violation of the first amendment. Certainly for tenured faculty the Statement of Policy for Continuous Employment and Academic Freedom of Bloomsburg State College appears to confer contract rights with respect to the hearing procedures outlined in article 9. The cross-reference from article 5(e) to article 9, while ambiguous, could well support a finding that even nontenured faculty members have a contractual right to have the renewal decision made without the taint of considerations violative of academic freedom, whatever that term means. If article 5(e) does grant a contract right, Skehan has been deprived of it since the October 17, 1970 termination took place before any article 5(e) hearing was held, and the December 1, 1970 hearing was not addressed to the article 5(e) issue. In the absence of district court findings on the scope of article 5(e) under Pennsylvania law we must, as did the Supreme Court in *Perry* v. *Sindermann*, *supra* at 599-603, remand. If the district court finds that article 5(e) gave Skehan a contractual interest of some kind, an appropriate remedy for its breach must be fashioned.

III. The Liberty-First Amendment Claim

It is clear that nonrenewal of a nontenured public school teacher's one-year contract, or midyear termination of that contract, may not be predicated even in part on his exercise of first amendment rights. *Perry* v. *Sindermann*, *supra* at 596-98; *Simard* v. *Board of Education*, 473 F.2d 988 (2d Cir. 1973). It is also clear that contract rights aside, the allegation that nonrenewal or midyear termination was based on the teacher's exercise of first amendment rights does not give him a right to a hearing by the institution. Rather, such an allegation

of a substantive violation of federal constitutional rights is heard and determined by the court in the first instance. *See Perry* v. *Sindermann*, *supra* at 599 n.5; *Clark* v. *Holmes*, 474 F.2d 928, 932 n.4 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973). The district court found that Skehan had not proven by a preponderance of the evidence his allegation that

> ". . . he was discharged . . . because of his stands on campus issues which were contrary to the administration's positions, in violation of his First and Fourteenth Amendment rights to free speech. . . . On the contrary, I find that Plaintiff was discharged because of his refusal to follow administrative directives relating to the schedule of classes in the Fall of 1970." 358 F.Supp. at 334.

Skehan contends this finding is clearly erroneous. But while there is ample evidence which would have supported a contrary finding,[3] there is evidence supporting the district court finding.[4] We cannot say that it is clearly erroneous and we cannot substitute our evaluation of the evidence for that of the district court. Thus whatever rights Skehan has with respect to the October 17, 1970 discharge depend upon the termination of his contract without procedural due process.

The terminal year decision, however, presents a separate issue. The district court finding that the October 17, 1970 termination was caused by the scheduling incident rather than by Skehan's prior stands on campus

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[3] Skehan points to his activist position on the Vietnam war, the administration's displeasure with this extracurricular activities, the trivial nature of the scheduling dispute, and Nossen's intempered utterances toward him.

[4] The district court points out, for example, that there is no evidence suggesting that his views on Vietnam differed from those of the administration, or that the administration was even aware of the extracurricular activities. 358 F.Supp. at 432 n.1. Certainly there was a scheduling dispute.

issues does not dispose of his claim that the termination year decision, made several months before the scheduling dispute arose, was similarly motivated. On that issue the district court made no finding. If it were to find that the decision not to renew his contract was based on stands on campus issues with which the administration disagreed, the nonrenewal decision would be substantively defective under the first amendment and the court would have to fashion an appropriate remedy.

IV. The District Court's Remedy

The district court rejected Skehan's claim for reinstatement and backpay, and awarded nominal damages for the property-procedural due process violation which it found. Since we have already determined that additional findings are required with respect to the article 5(e) contract claim and the first amendment claim on the terminal year decision, the district court obviously will have to reconsider the remedy problem with respect to those claims. Even with regard to the termination claim, however, the district court's award of nominal damages was improper. The court reasoned that "had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same." 358 F.Supp. at 436. This conclusion was thought to follow from the court's finding on the liberty-first amendment claim, that the termination resulted from the scheduling dispute. But while it was proper for the court to consider that claim in the first instance, it was not proper to substitute the finding it made for the in-house hearing which the institution should have afforded prior to terminating the 1970-71 contract. Such a retrospective substitution of the district court's judgment for that of the administrative hearing officers seriously undermines the hearing requirement. A district court cannot exercise the discretion which is vested in an administrative hearing board, nor can it bring to the dispute the same expert knowledge of the academic environment which should enlighten the deliberations of an academic hearing agency. A board of his academic peers might regard Skehan's scheduling imbroglio as far more trivial than would a district judge. A board of his academic peers might say he is guilty of misconduct, but he should not be fired for that kind of misconduct. The district judge could not exercise such discretion. Furthermore, if we countenance the practice of making findings which the institution should have made, a substantial incentive toward affording procedural due process prior to contract termination will be removed. The result will be to place considerable unreviewable discretion in the hands of the administrators by permitting discriminatory application of the availability of pretermination hearings. Those discriminated against will be forced to the expense, inconvenience and delay of a lawsuit to get what remains of the due process hearing which should have been provided by the state at the administrative level in the first instance. If the due process protection of contract rights mandated by *Board of Regents* v. *Roth, supra*, and *Perry* v. *Sindermann, supra*, is to be meaningful, the sanction for deprivation of that protection must be something more than was awarded in this case. *See, e.g., Greene* v. *United States*, 376 U.S. 149 (1964); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365-66 n.18 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535, 545-46 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957).

V. The Appropriate Remedy

Skehan seeks what has sometimes been characterized as the equitable remedy of reinstatement with backpay. The reinstatement remedy has been awarded frequently for terminations unlawful for procedural, *see, e.g., Vitarelli* v. *Seaton, supra; McNeil* v. *Butz*, 480 F.2d 314 (4th Cir. 1973); *Cooley* v. *Board of Education*, 453 F.2d

282 (8th Cir. 1972); *Olson* v. *Regents of University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969); *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969), or substantive, *see, e.g.*, *Stolberg* v. *Members of the Board of Trustees*, 474 F.2d 485 (2d Cir. 1973); *Rauls* v. *Baker County, Georgia, Board of Education*, 445 F.2d 825 (5th Cir. 1971), defects. Application of that remedy is complicated in this case by the fact that the 1970-71 contract year had already expired by the time the suit started, by the absence of a finding with respect to the article 5(e) claim which might have extended Skehan's contract rights past June of 1971, and by the absence of a finding on the claim that nonrenewal was for reasons prohibited by the first amendment. But assuming no more than the due process violation which the district court found, backpay from October 17, 1970 to the end of the contract year would seem appropriate. Skehan also seeks attorneys fees. We must first determine, however, from which of the defendants these remedies, or any other retroactive remedies the district court may deem appropriate, may be obtained.

A. The College

Bloomsburg State College is named as a defendant. The Attorney General of the Commonwealth appeared for it and all other defendants, filing a common answer for all. The status of the College in the governmental structure of the Commonwealth is somewhat ambiguous. We noted a similar ambiguity in *Braden* v. *University of Pittsburgh*, 477 F.2d 1, 6-7 (3rd Cir. 1973) with respect to the status of the University of Pittsburgh, which, like Bloomsburg State College, is a part of the Commonwealth system of higher education. But unlike the University of Pittsburgh, Bloomburg State College apparently has no separate corporate existence. *Compare* Pa. Stat. Ann. tit. 24, §§ 20-2002(7), 20-2003, 20-

2003.1, *with* University of Pittsburgh—Commonwealth Act, Pa. Stat. Ann. tit. 24, §§ 2510-201 to 2510-211. In *Ayala* v. *Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973), decided after our opinion in *Braden*, the Supreme Court of Pennsylvania abolished governmental immunity for local government units; in that case a school board. That holding would seem to apply to separately chartered educational institutions such as the University of Pittsburgh carrying out the governmental function of public higher education. And if under Pennsylvania law Bloomsburg State College is a subsidiary governmental unit, it too, is amenable to suit. Thus there would be no state sovereign immunity problem with respect to a backpay award assuming, as we do, subject matter jurisdiction to make such an award.[5] If under Pennsylvania law Bloomsburg State College is in effect merely an agency of the Commonwealth rather than a subsidiary governmental unit, the *Ayala* case does not apply, for in *Brown* v. *Commonwealth of Pennsylvania*, 453 Pa. 566, 305 A.2d 868 (1973) the Supreme Court of Pennsylvania made clear that the Commonwealth still claimed immunity. *See also* Pa. Stat. Ann. tit. 17, § 211.401. The district court did not decide into which category Pennsylvania would fit Bloomsburg State College. Assuming that it would fall within *Brown* rather than *Ayala*, Skehan urges that the Commonwealth has, by not pleading soverign immunity in the district court, waived that defense. It is well established that the defense of sovereign immunity from suit in a federal court may be waived. *E.g.*, *Missouri* v. *Fiske*, 290 U.S. 18, 24 (1933). A general appearance in litigation in a federal court may be such a waiver. *Clark* v. *Barnard*, 108 U.S. 436, 447-48 (1883). But while the Attorney General did not plead sovereign immunity on behalf of the College in the district court

[5] *See* page 26 *infra*.

he vigorously asserted it here. In *Edelman* v. *Jordan*, 42 U.S.L.W. 4419, 4427 (U.S. March 25, 1974) the Supreme Court held "that the eleventh amendment defense sufficiently partakes of the nature of the jurisdictional bar so that it need not be raised in the trial court." That holding would seem to have overruled the Ninth Circuit decision in *Lidie* v. *State of California*, 478 F.2d 552 (9th Cir. 1973) upon which Skehan relies, and to have limited the applicability of cases such as *Clark* v. *Bernard*, *supra*. *Edelman* v. *Jordan*, *supra*, also reversed *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir. 1973) which had held that in connection with equitable relief against individual defendants a retroactive monetary award could be made from state funds.[6] Thus if under Pennsylvania law the College is an agent of the Commonwealth, state sovereign immunity would preclude the award of any relief against it directly and any but prospective monetary relief, equitable or legal, in an order directed against the individual defendants. *Edelman*, while not ruling on the matter specifically, appears to bar the award of attorneys fees from the state treas-

[6] The Court approved the Second Circuit's decision in *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), 42 U.S.L.W. at 4423, which had been followed in recent decisions of the Fourth and Eighth Circuits, *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973) and *Like* v. *Carter*, 486 F.2d 552, 554 (8th Cir. 1973), *petition for cert. filed sub nom. Burns* v. *Doe*, 42 U.S.L.W. 3122 (U.S. Sept. 11, 1973) (No. 73-406). The Court overruled its decisions in *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* 2 CCH Pov. L. Rptr. ¶ 15,384 (N.D.Ind. 1972) (3-judge court); *State Dep't of Health and Rehabilitative Services* v. *Zarata*, 407 U.S. 918 (1972), *aff'g* 347 F.Supp. 1004 (S.D.Fla. 1971) (3-judge court); *Wyman* v. *Bowens*, 397 U.S. 49 (1970), *aff'g* 304 F.Supp. 717 (S.D.N.Y. 1968) (3-judge court) (*see* order as [1968-71 transfer binder] CCH Pov.L. Rptr. ¶ 10,506); and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *aff'g* 270 F.Supp. 331, 338 n.5 (D.Conn. 1967) (3-judge court), to the extent payment of retroactive benefits was ordered in these cases. *See also* note 7 *infra*.

ury as well.[7] But if the College is a subsidiary govern-

[7] The contention could be made that, by failing to expressly overrule its summary affirmance in *Sims* v. *Amos*, 409 U.S. 942 (1972), *aff'g* 336 F.Supp. 924 (M.D.Ala. 1972) (3-judge court) of an award of attorneys fees against state officers which was to be satisfied from the state treasury, the Court meant to leave the issue open. *See Gates* v. *Collier*, 489 F.2d 398 (5th Cir. 1973) following *Sims* and quoting the jurisdictional statement raising the eleventh amendment issue before the Court. Such a conclusion would, however be inconsistent with the *Edelman* Court's rationale. We attribute the Court's omission to inadvertence. For a listing of other decisions overruled, *see* note 6 *supra*.

Skehan, pointing to language in Justice Marshall's dissent in *Edelman* v. *Jordan*, *supra*, contends that the liability of the Commonwealth for retroactive benefits in his case is still open. Justice Marshall wrote:

> "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue." 42 U.S.L.W. at 4432 n.2.

An appreciation of this cryptic comment requires some refined analysis of the issues dealt with in Justice Rehnquist's majority opinion. Claims for money against a state can arise in three separate legal frameworks. First, the claim may be based upon state law, purely and simply; breach of contract, for example. Second, it may be based upon federal law made binding upon the states by virtue of the supremacy clause; nonpayment of benefits mandated by the Social Security Act, for example. Third, it may be based upon the fourteenth amendment, which binds the states directly and under § 5 of which Congress has the power to create remedies. *Edelman* involves retroactive welfare benefits withheld in violation of the Social Security Act, and thus falls in the second legal framework. A fourteenth amendment claim provided a basis for federal jurisdiction, but was not decided. *See Hagans* v. *Lavino*, 42 U.S.L.W. 4381 (U.S. March 25, 1974). Thus Justice Marshall is technically correct that *Edelman* does not dispose of the third category. But majority opinion expressly overrules *Shapiro* v. *Thompson*, *supra*, *State Department of Health and Rehabilitative*

ment unit both as a matter of Pennsylvania law under the *Ayala* case and as a matter of the federal law of state sovereign immunity, nonprospective monetary relief is available. *See Edelman* v. *Jordan*, 42 U.S.L.W. at 4424, n.12. We do not deem it appropriate on this record to make a determination into which category Pennsylvania law places the college, especially since that record was not developed with the benefit of the *Ayala* and *Brown* cases in Pennsylvania and the *Edelman* case in the Supreme Court. On remand the district court should make an appropriate determination. If it concludes that the College is a subsidiary governmental unit, an appropriate decree can include retroactive pay and attorneys fees. The extent of any backpay award will depend upon the court's findings on the article 5(e) and first amendment nonrenewal contentions.

B. The Individual Defendants

The individual defendants are not protected by sovereign immunity. Even if the College is immune, they may be ordered to reinstate Skehan at least until such time as he has been afforded such hearing as the court finds is required. As *Edelman* v. *Jordan* makes clear, that relief may include the payment of his salary prospectively out of College funds even though the College itself may be found to enjoy state sovereign immunity. As to backpay and attorneys fees, even if the College is immune there remains the question whether the individual defendants should be held liable. Such a recovery against individual defendants would be in the nature of damages, rather than as a part of the equitable remedy of reinstatement. Such a recovery of damages, as distinguished from reinstatement, must be predicated upon

Services v. *Zarate, supra*, and *Wyman* v. *Bowens, supra*, all fourteenth amendment cases. We think *Edelman* must be read as closing the door on any money award from a state treasury in any category.

conduct deemed to be tortious under federal, *Bell* v. *Hood*, 327 U.S. 678 (1946), 42 U.S.C. § 1988, or state law, 42 U.S.C. § 1988. The Attorney General on behalf of the individual defendants pleaded official immunity. We have held that a resolution of that defense requires the development of the facts as to whether the defendants in question are in positions where they exercise such discretionary governmental functions as to entitle them to official immunity. *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732, 734 (3d Cir. 1973); *Lasher* v. *Shaffer*, 460 F.2d 343, 344 (3d Cir. 1972); *see Bauers* v. *Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967). The district court made no findings on whether the individual defendants exercise such discretionary governmental functions, but unlike *Scheuer* v. *Rhodes*, 42 U.S.L.W. 4543 (U.S. April 17, 1974), *Safeguard Mutual Insurance Co.* v. *Miller, supra* and *Lasher* v. *Shafer, supra*, the position of each defendant is clear in the record, and the Pennsylvania statutes defining their duties establish that they exercise discretionary governmental functions. Pa. Stat. Ann. tit. 24, § 20-2008.2 (Board of Trustees); Pa. Stat. Ann. tit. 24, §§ 20-2003.1, 2003-2, 20-2004 (Secretary of Education); Pa. Stat. Ann. tit. 24, §§ 20-2004, 20-2004.1 (President). Of course, as indicated above, this official immunity from claims for damages and attorneys fees does not preclude injunctive relief. *Ex parte Young*, 209 U.S. 203 (1903); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d at 734-35. Thus, to the extent that the order appealed from denied recovery of backpay and attorneys fees from the individual defendants, we affirm, though for different reasons than relied on by the district court.

C. Attorneys Fees

Although it found that a due process violation had taken place and awarded nominal damages, the court refused to award Skehan attorneys fees. Such awards

have repeatedly been held to be appropriate in suits seeking redress for improper dismissal. *E.g.*, *Stolberg* v. *Members of the Board of Trustees*, 474 F.2d 485 (2d Cir. 1973); *Donahue* v. *Stauton*, 471 F.2d 475, 482-83 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972). *See Cooper* v. *Allen*, 467 F.2d 836, 840 (5th Cir. 1972). Attorneys fees have also been awarded frequently in civil rights cases not involving dismissals from employment. *E.g.*, *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lea* v. *Southern Homes Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *N.A.A.C.P.* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Dyer* v. *Love*, 307 F. Supp. 974 (N.D. Miss. 1969). *See Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The district court refused to make such an award because "the constitutional deprivation was technical in nature; it was not the product of bad faith on the part of the Defendants." Order of June 12, 1973 (unreported), at 2. Undoubtedly this conclusion was reinforced by the district court's ruling, which we have reversed, that it could substitute its decision for the due process which the College should have afforded. Withholding an award of attorneys fees in a case where a constitutional violation has been established removes a substantial incentive toward efforts looking to vindicate Constitutional rights. It is true, as the district court points out, that Skehan was pursuing an individual, not a class remedy. But the public has an interest in having its state-related institutions act in compliance with the fourteenth amendment. We therefore disapprove the reasons advanced by the district court for rejecting the attorneys fees request.

That does not end the inquiry, however. We have held that the individual defendants are covered by official immunity. If an attorneys fees award is to be made

it must be made against the College. Whether such an award can be made against it will, as we pointed out above, depend upon its status.

V. Jurisdiction

Skehan asserts jurisdiction under 28 U.S.C. § 1331 and under 28 U.S.C. §§ 1343(3), (4) and the Civil Rights Act. The jurisdictional amount requisite to support jurisdiction under § 1331 is pleaded, and the claim for recovery in excess of $10,000 clearly is not frivolous. Jurisdiction over the individual defendants is clear both under § 1331 and under § 1343 and 42 U.S.C. § 1983. Because the requisite jurisdictional amount for § 1331 is pleaded, the fact that the College is not a "person" within the meaning of 42 U.S.C. § 1983 is not significant. Thus we have no occasion in this case to determine whether, in view of the Commonwealth's abandonment of state sovereign immunity with respect to subgovernmental units in the *Ayala* case, those units may be sued in a federal court where, because the claim is less than $10,000, jurisdiction must be predicated on 28 U.S.C. §§ 1343(3), (4). *But see* 42 U.S.C. § 1988. There is § 1331 jurisdiction to award relief against the College if under Pennsylvania law it is not an agency of the Commonwealth covered by the Commonwealth's immunity.

VI. Conclusion

The judgment of the district court will be vacated and the case will be remanded for findings of fact:

1. as to the governmental status of Bloomsburg State College;
2. as to the nature of the interest created under Pennsylvania Law by article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College;
3. as to whether the decision not to renew Skehan's contract after 1970-71 was based on stands on campus issues with which the administration disagreed.

Since we have held that the individual defendants are entitled to official immunity, if the court should find that the College is covered by the Commonwealth's state sovereign immunity neither backpay nor attorneys fees could be awarded. If the court should find that the College is within the *Ayala* rather than the *Brown* case an award of backpay should be considered. The extent of such an award will depend upon the court's findings as to the article 5(e) claim and as to the reason for nonrenewal. If Skehan's only contract right expired by its terms at the end of the 1970-71 academic year, and there was no first amendment violation, the backpay award should cover the 1970-71 period only. The claim for reinstatement would then be moot. But if either the article 5(e) claim or the first amendment claim should be decided in Skehan's favor, the court should consider the award of backpay to date if the College is not immune, and also prospective reinstatement, as to which there is no immunity problem, at least until appropriate college procedures have taken place. If the

College is not immune the court should also reconsider its ruling on the award of attorneys fees.

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

_____

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1613

DR. JOSEPH T. SKEHAN,
Appellant

vs.

BOARD OF TRUSTEES OF BLOOMSBERG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTENGER, SUPERINTENDENT OF EDUCATION COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE

(D.C. Civil Action No. 72-644)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: BIGGS, GIBBONS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 11, 1973, be, and the same is hereby vacated and the cause is remanded for findings of fact and further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

[SEAL]

May 3, 1974

A TRUE COPY:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

[Received & Filed May 3, 1974, Thomas F. Quinn, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1613

DR. JOSEPH T. SKEHAN,
Appellant,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOLAN AND DR. CHARLES CARLSON AND JOHN PITTINGER, SUPERINTENDENT OF EDUCATION COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE,
Appellees.

(D.C. Civil Action No. 72-644)

Present: BIGGS, GIBBONS and GARTH, *Circuit Judges*

ORDER AMENDING OPINION

This 11th day of June, 1974 it is ORDERED that the opinion filed May 3, 1974 is hereby amended as follows:

Slip opinion page 17, line 20, after the words "*Barnard, supra.*" add:

> *See Jordon v. Gilligan*, No. 73-1973 (6th Cir., Apr. 25, 1974), vacating as void under rule 60(b) a judgment awarding attorneys fees against the state. *But see Jordan v. Fusari*, No. 73-2364 (2d Cir., Apr. 29, 1974).

Slip opinion page 18, line 10 of footnote 7, after the word "*supra.*", continuing in the same paragraph, add:

> *See also Jordan v. Gilligan, supra*, finding, after *Edelman*, an eleventh amendment bar to the award of attorneys fees. *But cf. Jordan v. Fusari, supra.*

Slip opinion page 20, line 10, after the words "governmental functions" add a new footnote, footnote 8:

[8] The district court did find, as required by *Scheurer*, that the constitutional deprivation was technical in nature and "not the product of bad faith on the part of Defendants." Order of June 12, 1973 (unreported), at 2.

By THE COURT,
JOHN J. GIBBONS,
Circuit Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1613

DR. JOSEPH T. SKEHAN,
Appellant,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTINGER, SUPERINTENDENT OF EDUCATION COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE,
Appellees.

(D.C. Civil Action No. 72 644)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ John J. Gibbons
Judge

Dated: June 11, 1974

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 72-644

DR. JOSEPH T. SKEHAN,
Plaintiff

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, ET AL.,
Defendants

OPINION

MUIR, District Judge.

This suit, brought pursuant to 28 U.S.C. §§ 1343, 2201, 2202, and 42 U.S.C. §§ 1981, 1983 and 1985, alleges deprivations of Plaintiff's constitutional rights in connection with the termination of his employment at Bloomsburg State College in October, 1970. Plaintiff requests damages and injunctive relief, including reinstatement. On January 11 and 12, 1973, a hearing was held to consider Plaintiff's request for a preliminary injunction. This request was denied by the court in an Opinion dated January 31, 1973, —— F.Supp. ——, because the nearly two-year delay in instituting this suit indicated that speedy action was not required. The case was placed on the April trial list for a hearing on final injunction and damages. Subsequently, the parties waived a further hearing on the merits and rested on the record developed at the January 11 and 12, 1973 hearing.

Plaintiff Joseph T. Skehan was appointed Associate Professor of Economics at Bloomsburg State College in January, 1969. His contract was renewed for the 1969-

1970 and the 1970-1971 school year. At no time did Dr. Skehan have tenure rights to continued employment.

Dr. Skehan did not confine himself to strictly academic duties. He assumed an activist position on many of the issues raised in the campus community, a position often grating to the administration at Bloomsburg. During the Spring of 1969, Dr. Skehan urged the formation of independent faculty and student organizations. In November and December, 1969, he strongly protested against the dismissal of Professor Deake Porter of the Economics Department, and acted as Porter's academic advisor in the matter. Dr. Skehan was also active in the protest over the firing of Dr. Maxwell Primack, and was appointed to the American Association of University Professor's Committee established to investigate that incident. In April, 1970, Dr. Skehan served as faculty advisor to students at Bloomsburg who expressed their dissatisfaction with the appointment of Defendant Nossen as President of the college.[1]

In addition to the administration's apparent displeasure with Dr. Skehan's extra-curricular activities, there was some criticism of the manner in which he performed his teaching duties. When Dr. Skehan was hired to teach at Bloomsburg in January, 1969, he was given a six-month "trial" contract because he came to Bloomsburg as a result of the non-renewal of his contract at Seton Hall University, the institution by which he was employed from 1965 until the Spring of 1968. Soon after he began teaching at Bloomsburg, Dr. Saini, the Chairman of the Economics Department, discussed with Dr. Skehan the impropriety of absenting himself from Friday afternoon classes by making arrangements with

[1] Dr. Skehan also actively protested against United States policy in Vietnam. However, there was no evidence suggesting that his views differed from those of the administration, or that the administration was aware of Dr. Skehan's activities.

the students to meet at some other time or with other colleagues to take charge of his classes. Also discussed was the difficulty students were having in seeing Dr. Skehan about problems relating to course work. Dr. Skehan assured Dr. Saini that he would adhere to the applicable regulations at Bloomsburg. Despite these assurances, he arranged, without proper approval, to have some other faculty members take charge of his class during an examination in May, 1969.

Dr. Skehan's contract was renewed for the 1969-1970 academic year. However, as early as February, 1970, he was verbally advised by Dr. Hoch, Vice-President and Dean of Faculties, that his services would no longer be required after May, 1971. This administration position was formalized on May 19, 1970, when Defendant Nossen sent to Dr. Skehan an offer of reappointment for the 1970-1971 academic year with the understanding that 1971 was to be the terminal year of his employment at Bloomsburg. Dr. Skehan did not execute the offer of reappointment, but on May 28, 1970 he sent to Defendant Nossen a letter which stated in part:

> "According with provisions on page three of Bloomsburg State College's 'Statement of Policy for Continuous Employment and Academic Freedom' I have re-appointment for the Academic year 1970-71. Your letter confirms the 1970-71 re-appointment. I intend to fulfill the 1970-71 appointment."

By letter dated June 1, 1970, Defendant Nossen informed Dr. Skehan that failure to execute the offer of reappointment by June 8, 1970, would be interpreted as a refusal of the offer. Dr. Skehan apparently appealed directly to the Board of Trustees. On June 15, 1973, Defendant Nossen sent to Dr. Skehan a letter which stated in part:

> "The College has prepared a contract form which is applicable to all persons offered appointment.

> Your refusal, to this point, to return the contract in accord with [the Board's] prescribed procedures continues to indicate to [the Board] your disregard for College procedures. Nevertheless, in view of the original intention to provide due notice, [the Board] will accept the alternative letter as an indication of your acceptance of the 1970-71 appointment as terminal."

On September 18, 1970, Dr. Skehan was sent a standard memorandum advising him that his salary for the 1970-1971 school year was $13,680.00. I find that Dr. Skehan had a contract of employment for the 1970-71 academic year.

The events giving rise to Dr. Skehan's midterm discharge occurred in the Fall of 1970. In February, 1970, the Economics Department met and adopted a proposed schedule of courses to be given in the 1970 Fall semester. Pursuant to this proposed schedule, Dr. Skehan was to teach one advanced course in micro economics, and three principles courses in micro or macro economics. Shortly before August 27, 1970, the College Registrar issued a memorandum to all department chairmen stating that any desired changes in the proposed schedules should be submitted on or before August 27, 1970. No changes were submitted by the Economics Department prior to that deadline. However, on September 12, 1970, three days before classes began, the Economics Department met and approved several proposed schedule changes involving Dr. Skehan and other members of the Department. The request to change the schedule was denied by Vice-President Hoch on September 14, 1970, and the denial was communicated to Dr. Skehan on September 15, 1970. Nevertheless, Dr. Skehan and Professor Porter followed the schedule as changed at the September 12, 1970 Department meeting. Following receipt on September 22, 1970, of a letter from Dr. Hoch directing him to follow the official class schedule, Dr. Skehan began meeting with his classes under the official schedule and with his classes under the requested schedule. Dr. Skehan and Professor Porter both participated in the advanced micro economics course, officially assigned to Dr. Skehan. Professor Porter prepared the course materials and led the classroom procedures.

Pursuant to a request by Dr. Skehan, Vice-President Hoch arranged a meeting on September 29, 1970, to discuss the scheduling problems. At the meeting, attended by the members of the Economics Department and Vice-President Hoch, Dr. Skehan and Professor Porter were given an opportunity to present their views. Vice-President Hoch stated that he denied the requested schedule changes because he felt that the changes were requested for purely personal reasons, and because the changes were not submitted prior to the August 27, 1970 deadline. Other members of the Economics Department, including the acting chairman, Mr. Ross, stated that the Department had sought schedule adjustments and that in light of the Vice-President's veto of the proposed schedule changes, the official schedule should be adhered to. At the conclusion of the meeting, Vice-President Hoch read a statement which provided in part:

> ". . . Dr. Skehan and Mr. Porter are hereby directed to follow the official class schedule, which appears in the Master Class Schedule for the full semester of the college year 1970-71, beginning Wednesday, September 30, 1970, at 8:00 A.M.
>
> "It is only fair to warn each of you gentlemen that immediate and direct administrative action will follow your failure to teach your classes as scheduled in the official schedule book."

A similar directive and warning was provided to Dr. Skehan in a letter to him from Vice-President Hoch dated September 30, 1970.

On or about October 1, 1970, Dr. Skehan was observed teaching courses not assigned to him under the official schedule. Apparently, Dr. Skehan and Professor Porter utilized a procedure similar to the one employed between September 22, and September 29, whereby both professors participated jointly in the disputed courses. However, it does appear that Dr. Skehan was principally in charge of the Labor Economics course officially assigned to Professor Porter. This was in violation of Vice-President Hoch's directive, in spirit if not in letter. As a result of Dr. Skehan's actions, he was notified by President Nossen by letter dated October 9, 1970, that he was relieved of teaching duties pending a final hearing. Dr. Skehan was given five days in which to account for his actions by letter to President Nossen. Dr. Skehan refused to make an accounting, and on October 19, 1970, was removed from the payroll effective October 17, 1970. On October 23, 1970, the Board of Trustees approved Dr. Skehan's dismissal.

On December 1, 1970, the Committee on Academic Affairs conducted a hearing concerning the dismissal of Dr. Skehan. Dr. Skehan appeared only to state that he would not participate in the hearing. On the basis of correspondence and records submitted by the administration, the Committee unanimously approved the dismissal action. Dr. Skehan submitted no material for consideration at the hearing.

Plaintiff first alleges that he was discharged from his employment with Bloomsburg State College because of his stands on campus issues which were contrary to the administration's positions, in violation of his First and Fourteenth Amendment rights to free speech. However, the Plaintiff was not shown by a preponderance of the evidence that this allegation is true. On the contrary, I find that the Plaintiff was discharged because of his refusal to follow administrative directives relating to the schedule of classes in the Fall of 1970. He was not discharged for reasons prohibited by the Constitution.

Next, Plaintiff contends that he was deprived of his right to procedural due process when he was denied a hearing prior to discharge. The Supreme Court has held that a nontenured professor has a constitutional right to a statement of reasons and a hearing on a university's decision not to renew his contract if he can show that the non-renewal deprives him of an interest in "liberty" or a "property" interest in continued employment. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry vs. Sindermann, 408 U.S. 593 (1972). Likewise, a college professor dismissed during the term of his contract possesses a property interest safeguarded by due process. Board of Regents v. Roth, *supra*, at pp. 576-77. See Wieman v. Updegraff, 344 U.S. 183 (1952). This is precisely the situation in the case at bar. Therefore, Plaintiff's dismissal during the term of his contract for the 1970-71 academic year at Bloomsburg State College entitled him to a hearing on the reasons for his dismissal.

The Defendants contend that Plaintiff was, in fact, afforded a hearing at the September 29, 1970 meeting with Vice-President Hoch. The September 29 meeting was called to discuss the scheduling controversy which ultimately gave rise to Plaintiff's discharge effective October 17, 1970. However, the meeting was concerned with events which transpired prior to September 29. It was Plaintiff's subsequent failure to abide by the directive propounded at the meeting which precipitated his discharge. Although Plaintiff was not constitutionally entitled to reargue his position on the question of which schedule was controlling, he was entitled to a hearing at which he might have attempted to justify his actions

after September 30, 1970, or to have presented reasons why dismissal was not the appropriate sanction.

The hearing on December 1, 1970 before the Committee on Academic Affairs did not fulfill the constitutional requirements of procedural due process in this case. The hearing was held 1½ months after Plaintiff's discharge. Absent special circumstances, due process requires that one who is deprived of a protected interest be given a hearing prior to the deprivation. Board of Regents v. Roth, supra, at p. 570, n. 7; Commonwealth of Pennsylvania *ex rel.* Rafferty v. Philadelphia Psychiatric Center, —— F. Supp. ——, Civ. Action No. 72-2521 (E.D. Pa. March 27, 1973). See Fuentes v. Shevin, 407 U.S. 67 (1972). The case at bar does not represent the kind of extraordinary situation in which the requirement of a prior hearing is relaxed. See Phillips v. Commissioner, 283 U.S. 589, 597 (1931); Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921); Citta v. Delaware Valley Hospital, 313 F. Supp. 301, 309-10 (E.D. Pa. 1970).

Having decided that Dr. Skehan was deprived of his constitutional right to a prior hearing, I turn now to the question of appropriate relief. Plaintiff asks for reinstatement with back wages and damages. In my view, reinstatement with back wages would be inappropriate in the case at bar in light of (1) the Court's finding that the Plaintiff was not discharged for exercising his constitutional rights, and (2) Plaintiff's two-year delay in instituting this action.[2] Cases in which courts have ordered reinstatement because of a lack of procedural due process presented situations where either the court found that the Plaintiff was discharged for constitutional impermissible reasons, see e.g. Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center, —— F.Supp. ——, Civil Action No. 72-2521 (E.D. Pa. March 27, 1973), or where the Plaintiff instituted the action shortly after the constitutional deprivation, see e.g. Karstetter v. Evans, 350 F.Supp. 209 (N.D. Tex. 1971); Newcomer v. Coleman, 323 F.Supp. 1363 (D. Conn. 1970); Lafferty v. Carter, 310 F.Supp. 465 (W.D. Wis. 1970). Furthermore, the recent Supreme Court pronouncements concerning procedural due process in the context of the dismissal of a state employee indicate that reinstatement is not an appropriate remedy. In remanding the case to the lower courts, the Court in Perry v. Sindermann, *supra*, stated that Plaintiff's proof of a property interest would entitle him to a hearing prior to dismissal, but

> ". . . would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

It appears from the above statement in *Perry* that an appropriate remedy would be to order the Defendants to give Dr. Skehan a hearing at this time. Under normal circumstances I would take such a course. However, this is not the usual case, and there are numerous considerations militating against ordering a hearing to be held 2½ years after Plaintiff's discharge. Most important, I feel that a hearing at this time would be fruitless. I have found that Plaintiff's dismissal was not grounded upon constitutionally impermissible reasons. Therefore, were a hearing to be held at this time, Plaintiff could only attempt to justify his refusal to obey the administrative directive on class scheduling after September 30, 1970. I have heard Plaintiff's testimony on this matter, and I find it highly unlikely that a hearing committee, considering the same evidence, would reverse

[2] Plaintiff was discharged on October 19, 1971, effective October 17, 1971. The complaint was filed October 10, 1972 in the Eastern District of Pennsylvania.

the administration's decision to discharge the Plaintiff. That decision was eminently reasonable under the circumstances. It has been held that where the Plaintiff was deprived of his right to procedural due process the court should not refer the case back for a due process hearing when such a hearing would not result in altering the action taken against the Plaintiff. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). See Stevenson v. Board of Education of Wheeler County, 426 F.2d 1154 (5th Cir. 1970). The following factors have also affected my decision not to order a hearing at this time: (1) Plaintiff's failure to request, in his complaint or elsewhere, that he now be given a hearing by the college on the reasons for his dismissal; (2) Plaintiff's failure to participate in the post-dismissal, December 1, 1970 hearing, which from all appearances, would have been a fair and impartial one; and (3) Plaintiff's long delay in instituting this action.

While Plaintiff was deprived of his constitutional right to a hearing prior to dismissal, the deprivation was technical in nature. By such a classification I do not wish to demean a state employee's right to procedural due process. However, the circumstances surrounding this particular case indicate that had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Plaintiff's discharge was based upon facts rationally determined and for reasons unrelated to Plaintiff's exercise of constitutional rights. The Plaintiff has not proven any actual damages arising from Defendant's failure to give him a hearing. However, nominal damages are proven by proof of a deprivation of a right to which the Plaintiff is entitled. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). Therefore, the Clerk will be directed to enter judgment in favor of the Plaintiff for one dollar, together with costs.

An appropriate order will be entered.

This Opinion shall constitute the court's findings of fact and conclusions of law under F.R.Civ.P. 52(a).

/s/ Muir
MUIR
United States District Judge

DATED: May 9, 1973

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action File No. 72-644

DR. JOSEPH T. SKEHAN

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTENGER, SUPERINTENDENT OF EDUCATION COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE

JUDGMENT

This action came on for hearing before the Court, Honorable Malcolm Muir, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff recover of the Defendants the sum of one dollar ($1.00), together with costs.

Dated at Scranton, Pennsylvania, this 11th day of May, 1973.

DONALD R. BERRY
Clerk of Court

By: /s/ Mary E. Pamelia
MARY E. PAMELIA
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 72-644

DR. JOSEPH T. SKEHAN,
Plaintiff

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, ET AL.,
Defendants

ORDER

June 12, 1973

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

By Opinion and Order dated May 9, 1973, —— F. Supp. ——, this Court found that the Plaintiff had been deprived of his right to procedural due process and ordered the Clerk to enter judgment in favor of Plaintiff for one dollar, together with costs. Before the Court at this time are motions by Plaintiff to amend the judgment and for the allowance of attorney's fees.

In requesting an amendment of the judgment, Plaintiff contends that he is at least entitled to monetary damages for the two years that he has been without employment. It is elementary that the purpose of damages is to put the Plaintiff in the same position, so far as money can do it, as he would have been had the Defendants' breach of duty not occurred. See Milwaukee and St. P.R. Co. v. Arms, 91 U.S. 489 (1875). In the May 9, 1973 Opinion, the Court found that while Plaintiff was deprived of his right to a hearing prior to discharge, his dismissal was not based upon constitutionally improper reasons, that

the decision to discharge Plaintiff was eminently reasonable, and that in all probability the outcome would have been the same had Plaintiff been given a prior hearing. In other words, any damage sustained by Plaintiff resulted from his refusal to follow administrative directives relating to class scheduling, Opinion at p. 8, not from the Defendants' failure to provide him with a proper due process hearing. Under these circumstances, it would be unjust for the Court to award more than nominal damages.

In regards to Plaintiff's motion for the allowance of attorney's fees, the Court is aware that it has the discretionary authority to award attorney's fees in civil rights cases when justice so requires. Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir. 1970). Generally, attorney's fees may be awarded when either (1) the Defendants have acted unreasonably or in bad faith, see Williams v. Kimbrough, 415 F.2d 874 (5th Cir. 1969); (2) the result of Plaintiff's efforts has been the creation of a fund or other economic benefit to be shared by members of a represented class, see Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F.2d 233 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1930); or (3) the result of Plaintiff's efforts has been the enforcement of a right, or the enjoinment of a constitutional deprivation, which directly benefits a large segment of the community, see Bradley v. School Board of City of Richmond, Virginia 53 F.R.D. 28 (E.D. Va. 1971). This later category almost uniformly involves racial desegregation cases. The facts in the case at bar fit none of these categories. As pointed out in the May 9, 1973 Opinion at p. 12, the constitutional deprivation was technical in nature; it was not the product of bad faith on the part of the Defendants. Nor can this suit be deemed directly to benefit a large segment of the community. Plaintiff brought the action to vindicate his

personal rights under his contract and under the U.S, Constitution. To the extent that Bates v. Hinds, 334 F.Supp. 528 (N.D. Tex. 1971), would compel a different conclusion on the question of the appropriateness of an award of counsel fees in this case, I decline to follow it.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiff's motion to amend the judgment is denied.

2. Plaintiff's motion for the allowance of attorney's fees and costs is denied.

/s/ Muir
MUIR
United States District Judge

6/13/73—Order Denies Motion to Reconsider

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

DR. JOSEPH T. SKEHAN,

Plaintiff,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, *ET AL.*,

Defendants.

Civil No. 72-644

ORDER

June 13, 1973

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

By Opinion and Order dated May 9, 1973, ... F. Supp. ...., the Court concluded that Plaintiff had been deprived of his right to procedural due process and ordered the Clerk to enter judgment in favor of the Plaintiff for one dollar, together with costs. By Order dated June 12, 1973, the Court denied Plaintiff's motions to amend the judgment and for the allowance of attorney's fees.

On May 23, 1973, Plaintiff, proceeding without the aid of counsel, filed a "Motion to Reconsider." The motion contests the validity of the court's findings of fact and conclusions of law as set forth in the May 9, 1973 Opinion. Several of the points raised by Plaintiff in this motion were considered and

rejected by the Court in its denial of Plaintiff's motions to amend the judgment and for the allowance of attorney's fees. Order of June 12, 1973. The remaining factual and legal assertions in Plaintiff's Motion to Reconsider are without merit and the Court adheres to the findings of fact and conclusions of law set forth in the May 9, 1973 Opinion, ... F.Supp. .....

NOW, THEREFORE, IT IS ORDERED THAT:

Plaintiff's Motion to Reconsider is denied.

MUIR,
United States District Judge.

Supreme Court, U. S.
FILED
JUN 13 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978
No. 78-1719

DR. JOSEPH T. SKEHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at Nos. 77-2311 and 77-2312

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1719

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondents submit this brief in opposition to Petitioner Skehan's Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Petitioner, Dr. Skehan, was appointed as a non-tenured Associate Professor of Economics at Bloomsburg State College in January, 1969. His contract was renewed for the 1969-70 academic year, but on February 27, 1970, the College's Board of Trustees, on the recommendation of defendant Nossen, decided that Skehan should be notified that the 1970-71 academic year would be the terminal year of his appointment. Skehan was notified of the Board's action through a letter from President Nossen, dated May 19, 1970.

On September 21, 1970, Skehan wrote Nossen a letter invoking Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College (hereinafter Article 5e). In that letter, he alleged that the decision not to reappoint him after 1970-71 had been caused by considerations violative of his academic freedom.[1] Nossen did not refer

[1] The Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College went into effect on September 1, 1968. It has since been superseded by a collective bargaining agreement, but was in effect during the entire period of Skehan's dispute with the College. Article 5e provided:

> If a faculty member's service to the College is to be terminated during the first two years of the probationary (pretenure) period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of infringement of academic freedom. If a faculty member of professorial rank, on probationary appointment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegation shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in No. 9 of this document will be followed.

Article 9 of the Statement, referred to in Article 5e, set out the formal procedures applicable to the dismissal of a tenured faculty member.

Skehan's letter to the Committee on Professional Affairs, the College body charged with initiating proceedings under Article 5e to resolve such allegations, nor did Skehan take any further action to secure an Article 5e hearing.

Contemporaneous with his invocation of Article 5e, Dr. Skehan became embroiled in a dispute between the economics department and the College's administration concerning the scheduling of classes. During that dispute, Skehan was warned that his failure to teach his classes as scheduled by the College would result in the taking of immediate and direct administrative action against him. On or about October 1, 1970, Dr. Skehan was observed teaching a course not assigned to him, and on October 9, Dr. Nossen notified Skehan that he was relieved of all classroom responsibilities pending a final hearing. Nossen's letter of October 9 also demanded of Skehan a "full and complete accountability" of his actions on campus since the start of the semester. When Skehan failed to comply with this demand, Dr. Nossen informed him that, effective October 17, 1970, he was removed from the College's payroll, subject to final approval by the Board of Trustees. That approval was obtained at the Board's regularly scheduled meeting of October 23, 1970.

Skehan filed a complaint in district court on October 10, 1972. He alleged that his suspension and ultimate dismissal in the fall of 1970 were in retaliation for his active role in campus political issues, and hence were violative of his rights under the First Amendment. He also alleged that the defendants suspended and dismissed him without complying with the applicable College laws and regulations governing faculty status, thereby depriving him of that due process of law guaranteed by the Fourteenth Amendment. He requested preliminary and permanent injunctive relief in the nature of reinstatement and an award of attorney's fees.

The district court held a hearing on Skehan's request for a preliminary injunction on January 11 and 12, 1973. Preliminary injunctive relief was denied in an opinion and order dated January 31, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 353 F. Supp. 542 (M.D. Pa. 1973). Subsequently, the parties stipulated that a final hearing could be held on the record developed at the preliminary injunction hearing, and the district court issued its opinion on the merits of May 9, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 353 F. Supp. 430 (M.D. Pa. 1973) (207a).

In that opinion, the district court held that Skehan's dismissal from the faculty had been a result of his actions during the scheduling dispute. Thus, his dismissal was found not to have been violative of the First Amendment. However, the district court did find that Skehan's dismissal during the term of his contract entitled him, under the Due Process Clause, to a prior hearing on the grounds of his dismissal, and that such a hearing had not been afforded Skehan by the College.

The District Court went on to find that had Skehan been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Accordingly, the district court found no proof of actual damages and awarded Skehan only nominal damages (216a).[2]

On appeal, the Court of Appeals for the Third Circuit affirmed both constitutional findings with respect to Skehan's dismissal, but remanded for reconsideration of the appropriate remedy. That court also remanded for findings of fact on the constitutionality of the decision not to renew Skehan's contract beyond 1970-71, as well as consideration of Eleventh Amendment questions and the propriety of attorney's fees. *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974) (178a).

Subsequently, this Court granted Skehan's petition for writ of certiorari, vacated the judgment of the Court of Appeals and remanded the case "for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* [421 U.S. 240 (1975)], and *Wood v. Strickland,* 420 U.S. 308 (1975)." 421 U.S. 983 (1975). On remand, the Court of Appeals reviewed the case en banc and held, *inter alia,* that the College was an agency of the Commonwealth, and, therefore, immune from suit under the Eleventh Amendment. That court also remanded the question of the official immunity of individual defendants to the district court for findings of fact concerning the good faith of those defendants. *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir. 1976) (154a).

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[2] See *Carey v. Piphus,* 435 U.S. 247 (1978).

On November 29, 1976, this Court denied defendants' petition for a writ of certiorari. 429 U.S. 979 (1976). Plaintiff (petitioner herein) sought no review of the Court of Appeals' order of remand to the district court.

On remand, the district court took further evidence on the questions of whether Skehan had a property interest in renewal in a non-tenured position and whether defendant Nossen acted in good faith with respect to Skehan's nonrenewal and subsequent termination. By order and opinion dated May 18, 1977 (101a), the district court found that plaintiff had a contractual right to certain pre-non-renewal procedures which was protected by the Fourteenth Amendment. It also found that defendant Nossen had acted in good faith at all relevant times. *Skehan v. Board of Trustees of Bloomsburg State College,* 431 F. Supp. 1379 (M.D. Pa. 1977).

On July 20, 1977, after holding a separate hearing on remedy, the district court denied Skehan's request for full reinstatement and ordered the College to place him on a suspended with pay status pending the outcome of a non-renewal and a pre-termination hearing to be held in accordance with the "contract" in effect at the time of Skehan's termination. Attorney's fees were also denied, in part on the basis of the Eleventh Amendment and, in part, on the basis of equitable considerations. *Skehan v. Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657 (M.D. Pa. 1977) (78a).

While the College initiated the non-renewal and termination procedures, Skehan appealed the decision of the district court. During the pendency of that appeal, those

procedures were completed and Skehan's employment was terminated by the College.[3]

On appeal, the Court of Appeals affirmed the judgment and holdings of the district court in nearly all respects, remanding only for consideration of an award of attorney's fees to Skehan against defendants in their official capacities, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. *Skehan v. Board of Trustees of Bloomsburg State College,* 590 F.2d 470 (3d Cir. 1978) (1a). The Court of Appeals refused to consider Skehan's complaints concerning the College's compliance with the lower court's order of July 20, 1977 requiring reinstatement if the appropriate pre-termination hearing was not held in a timely fashion. Instead, the Court of Appeals directed that that issue first be raised in the district court.[4]

On February 14, 1979, the Court of Appeals denied Dr. Skehan's petition for rehearing (55a). Subsequently, the Court of Appeals twice stayed issuance of its mandate, the second time until May 15, 1979. (53a-54a). Skehan filed his petition for writ of certiorari with this Court on May 15, 1979.

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[3] In this regard, a pre-termination hearing was held in early 1978 before a board consisting of nine faculty members. On April 7, 1978, after a full evidentiary hearing, that board recommended that Dr. Skehan's contract be terminated. That recommendation was approved by the Board of Trustees of the College and, on June 2, 1978, Skehan was removed from the College's payroll.

[4] Thus, Skehan's reference to the post-trial termination proceedings is not only inaccurate, but, more importantly, improper.

ARGUMENT

Petitioner requests this Court to grant certiorari to determine nine separate questions which he argues were improperly decided by the Third Circuit Court of Appeals. Properly framed, however, petitioner's questions can be put in four separate categories:

1. Did the lower courts properly determine that the Commonwealth of Pennsylvania is immune under the Eleventh Amendment from a claim for damages in federal court under 42 U.S.C. §1983;

2. Did the lower courts properly decide that Bloomsburg State College and its Board of Trustees are agencies of the Commonwealth and, therefore, share its sovereign immunity from suit in federal court;

3. Did the lower courts properly apply the standards set forth by this Court in *Wood v. Strickland*, 408 U.S. 564 (1972), in determining the immunity of a defendant college official; and

4. Did the trial court err in deciding that the non-renewal and termination of petitioner's employment were not violative of his First Amendment rights prior to the completion of court ordered administrative due process procedures related to that non-renewal and termination.

For the following reasons, this Court should not grant certiorari on any of the issues which petitioner seeks to raise.

1. The lower court properly reached[5] and decided the issue of whether the Commonwealth has immunity, under the Eleventh Amendment, from claims for damages under 42 U.S.C. §1983. In this regard, this Court recently recognized that Section 1983 does not authorize actions otherwise barred by the Eleventh Amendment. *Quern v. Jordan*, —— U.S. ——, 99 S.Ct. 1139 (1979).

This Court has also held that a state will be held to have waived its constitutional protection under the Eleventh Amendment only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."[6]

In *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), the Pennsylvania Supreme Court held that the state constitution did not provide the Commonwealth with a self-executing immunity from liability in state courts, but rather that such

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[5] Petitioner suggests that the defense of sovereign immunity was waived by respondents' alleged failure to raise it in the lower court. This contention is clearly without merit. *Edelman v. Jordan*, 415 U.S. 651 (1974).

Petitioner also suggests that he was improperly denied the right to amend his complaint and introduce new evidence concerning the issue of sovereign immunity. Never, however, did petitioner assert that right in the lower courts as he sought to amend his complaint only to add additional defendants (153a) and asked leave to present additional testimony only with respect to the reasons for the non-renewal of his teaching contract (150a). This issue is, therefore, not properly before this Court.

[6] Certainly, no such waiver can be found from the Commonwealth's historical submission to mandamus actions in *state courts*. See *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577 (1946).

immunity could be *established* only by action of the state legislature. In so holding, the Pennsylvania court did not, nor could it have, affected this Court's holdings that the protection of the Eleventh Amendment is self-executing and can be *waived* only by express legislative action. Nor did the state court consider whether such action had been taken. Subsequently, in legislation *limiting* the Commonwealth's liability in state courts, the state legislature made clear that none of its actions were intended to effect a waiver of Eleventh Amendment immunity.

2. The Court of Appeals properly held that Bloomsburg State College and its Board of Trustees are agencies of the Commonwealth and, therefore, share its Eleventh Amendment immunity from suit in federal court. In so doing, the Court of Appeals properly considered state court cases which examined the statutory relationship of identical entities to the Commonwealth and concluded that any judgment against those entities would necessarily be paid by the Commonwealth. See *Williams v. West Chester State College*, 29 Pa. Commonwealth Ct. 240, 370 A.2d 744 (1977); *Finklestein v. Shippensburg State College*, 29 Pa. Commonwealth Ct. 373, 370 A.2d 1259 (1977); *Brungard v. Hartman*, 12 Pa. Commonwealth Ct. 477, 315 A.2d 913 (1974)[7], *rev'd on other grounds*,

[7] Until the decision in *Mayle v. Pennsylvania Department of Highways, supra*, the courts of Pennsylvania had recognized a state constitutional immunity of the Commonwealth and its agencies from suit in state court. While the analysis applied to determine whether a given entity was an agency of the Commonwealth could become extremely complex, the primary factor was the fiscal relationship of the entity to the Commonwealth. *Poklemba v. Shamokin State General Hospital*, 21 Pa. Commonwealth Ct. 301, 344 A.2d 732 (1975), *rev'd on other grounds*, 479 Pa. 414, 388 A.2d 722 (1978). See also *Specter v. Commonwealth*, 462 Pa. 474, 341 A.2d 481 (1975).

—— Pa. ——, 394 A.2d 1265 (1978). It is just such judgments which are barred by the Eleventh Amendment. *Edelman v. Jordan, supra.*

3. The lower courts properly determined that the defendant school official acted in good faith and was, therefore, immune from liability in this lawsuit. In doing so, the lower courts correctly applied the standards established by this Court in *Wood v. Strickland*, 420 U.S. 308 (1975) and reaffirmed in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855 (1978). Certainly, no case had clearly established either the constitutional or contract rights asserted by petitioner prior to the date the defendant school official took the actions at issue in this lawsuit. *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. den.*, 425 U.S. 963 (1976). See *Procunier v. Navarette, supra.*

4. The lower courts acted properly in deciding that petitioner's non-renewal and termination violated no First Amendment rights of petitioner. First, petitioner never requested that either lower court forego deciding this issue until completion of administrative proceedings. Moreover, nothing in the administrative proceedings provided by petitioner's employment contract provided for a decision, in those proceedings, of First Amendment issues. Thus, this issue is not properly before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, his Petition should be denied.

Respectfully submitted,

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